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# REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

# SUPREME COURT

OF

LOUISIANA.

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J. HAWKINS,  
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**JUDGES**  
**OF**  
**THE SUPREME COURT.**

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**HON. JOHN T. LUDELING, CHIEF JUSTICE.**  
**HON. J. G. TALIAFERRO,**  
**HON. R. K. HOWELL,**  
**HON. W. G. WYLY,**  
**HON. W. W. HOWE,** } **ASSOCIATE JUSTICES.**  
**SIMEON BELDEN, ATTORNEY GENERAL.**

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## ERRATA.

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In Judge Wyly's dissenting opinion, in *State ex rel. Hernandez v. Flanders, Mayor*, on page 70, in eighteenth line from the top of the page, the word *funds* is used instead of *bonds*.

At page 89, in the case of *John Falconer v. Kate Stapleton, Taliaferro, J.*, instead of *Wyly, J.*, delivered the opinion of the court.

On page 250, in eighth line from the top, the word *mortgages* for *mortgagees*.

On page 257, *Wyly, J.*, concurring in the opinion of the court—instead of *Wyly J.*, concurring in Justice Howell's dissenting opinion.

On page 64, twelve lines from the bottom, the word *alleviate* is used instead of *alienate*.

On page 314, seventeen lines from the bottom, the word *judicial* is used instead of *juridical*.

On page 318, in twelfth line from the top, the sentence "*We therefore conclude by it,*" instead of "*He is therefore concluded by it.*"

On page 360, ninth line from the bottom, the sentence "*We think the privilege of preference,*" instead of "*We think the privilege or preference.*"

On page 381, in the case of *Johnson v. Duncan*, and on page 455, in the case of *Hamilton v. Elstner, Howe, J.*, instead of *Howell, J.*, delivered the opinion of the court.

On pages 504 and 505, in Justice Wyly's dissenting opinion, in *Swan v. Gayle*, the words "*accessory contract,*" are used instead of "*accessory right,*" in several instances.



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# CASES

ARGUED AND DETERMINED

IN THE

## SUPREME COURT OF LOUISIANA,

AT

### NEW ORLEANS.

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JANUARY, 1872.

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#### JUDGES OF THE COURT:

HON. JOHN T. LUDELING,	<i>Chief Justice.</i>	
HON. J. G. TALIAFERRO,		}
HON. R. K. HOWELL,		
HON. W. G. WYLY,		
HON. W. W. HOWE,		
	<i>Associate Justices.</i>	

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#### No. 2320.—THE ECLIPSE TOWBOAT COMPANY v. THE PONTCHARTRAIN RAILROAD COMPANY.

In the rule that "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it" (Rev. C. C. 2315), the phrase "every act" is controlled by the word "fault," and it results that the party bound must be in fault, that is to say, his conduct must be, in the general sense of the word, unlawful.

No one can be held liable for the regular and prudent exercise of a right that belongs to him, (L. 55, *f. de reg. juris*.) and he alone causes a legal injury who does what he has no right to do. (L. 151, *f. de reg. juris*.)

The defendants, owning a short railway, from New Orleans to Lake Pontchartrain, and one Morgan, owning a line of steamers plying from the Lake terminus to Mobile, and the plaintiffs and other parties owning two other steamers in the same trade, an arrangement was made by defendants with Morgan, and, temporarily, with the proprietors of the other steamers, respectively, to share *pro rata* the through freight from New Orleans to Mobile. It appeared that this arrangement was unprofitable to the defendants, for the lines of steamers, by competing and lowering the rates of freight, greatly reduced the share coming to the railway. The defendants therefore entered into an agreement with Morgan by which the latter loaned them \$250,000, and the former agreed to *pro rata* with him the through freight from New Orleans to Mobile, and to charge all other steamers the tariff rates paid by the public generally. The plaintiffs immediately laid up their steamer and sued for damages, on the ground that this *prorating* with Morgan and refusing to further *pro rata* with plaintiffs was an illegal combination with Morgan to confer on him an unlawful monopoly and preference.

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The Eclipse Towboat Company v. The Pontchartrain Railroad Company.

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Held—That the acts of defendants were not in contravention of any statute of Louisiana or any principle of her jurisprudence; that they might agree or refuse to pro rate through freight with anybody, and the plaintiffs could not complain of a refusal to pro rate with them; and that, as common carriers, in the absence of statutory prohibition, their acts in the premises were not unlawful.

**A**PPEAL from the Seventh District Court, parish of Orleans. *Collens, J. Elmore & King*, for plaintiffs and appellants, *Bradford, Lea & Finney*, for defendants and appellees.

Mr. W. W. King, one of the counsel for plaintiffs and appellants, made the following argument in this case before the Supreme Court:

#### ORIGIN OF THE SUIT.

In October, 1865, certain parties purchased the steamer *Creole*, with five other vessels. They gave \$16,000 for the *Creole*. This vessel was immediately put in the trade between New Orleans and Mobile, touching at the watering places on the lake. She continued in that trade three months and twelve days.

The earnings of the vessel during that time were \$50,821 54. Her expenses were about \$8000 per month, not including repairs; showing a net profit of \$23,621 54.

About the ninth of March, 1866, she was put into trade between New Orleans and the watering places across the lake. She continued in that trade until the twenty-eighth of August. She was then withdrawn to undergo repairs. During that interval her gross earnings were \$48,850 50; her expenses about \$34,000; showing a clear profit of \$14,850.

In April, 1866, the parties who had purchased the *Creole* and other vessels formed themselves into a corporation, and transferred the said vessels to the corporation, the transferee assuming all debts, and taking the vessels at the original costs. The present plaintiffs are that corporation. The vessel was laid up for repairs about seven months. About the ninth of March, 1867, she was put into the summer trade between New Orleans and the lake shore places. During this time there had been expended upon the vessel for repairs the sum of \$75,590 59.

In the early part of the summer season of 1867, the *Creole* was running profitably, until the Morgan line commenced reducing the fare in July.

The previous price had been four dollars to all places except Pascagoula, and five dollars to that place. These prices were reduced by the Morgan line to fifty cents and one dollar. The object of this reduction was to starve out all competition against the Morgan line. The result of this summer's campaign and race of competition was that at the end of the season the *Creole* had made over \$3000, and the *Laura*, the competing boat of the Morgan line, lost in running expenses over \$21,000, exclusive of repairs. Her repairs alone were estimated at \$10,000 or \$12,000.

On the seventeenth of April, 1866, Charles Morgan entered into a contract with the Pontchartrain Railroad Company, in which it was stipulated that he "or his agent shall during the said term (i. e., five years), have the right to charge such prices for carrying freights between New Orleans and Mobile or intermediate ports as they may deem best for the mutual interests of the parties; and the Pontchartrain Railroad Company, for its services thus performed, shall be entitled to charge and collect from the said Charles Morgan or his agent, instead of detailed freight charged by the tariff as heretofore, one-quarter of the total amount of freight moneys which the said



steamers may charge for freights thus mutually carried by the parties hereto."

The operation of this contract upon the railroad is very well described by the railroad superintendent at page 227 of the record. Other boats were allowed the same privilege. A very lively competition sprung up among them, which led to a reduction of freight from fifty cents per barrel to fifteen cents, and reduced the share of the railroad from twelve and one-half cents to three and three-fourth cents per barrel. Mr. Morgan did not succeed in driving off his competitors by means of the contract, and both he and the railroad company were doubtless disappointed in the result. A new contract was entered into about the first of November, 1867, in consequence of which, Mr. Pandelly, the superintendent of the railroad, issued to the plaintiffs the following notice:

"NEW ORLEANS, November 2, 1867.

Peter Marcy, Esq., Agent Steamer Creole:

SIR—I am instructed to notify you that on and after the fifteenth instant all freight transported by this road from and to the steamer Creole will be charged for in accordance with the company's tariff, a copy whereof is herewith transmitted.

Respectfully, G. PANDELLY, General Superintendent."

A similar notice was sent to the captain of the Camelia, the only other boat competing with the Morgan line.

The tariff which accompanied these notices increased immensely the rate of freight charged by the road. Instead of three and three-fourths cents per barrel, the price was raised to twenty-five cents, which was ten cents more than the whole freight charged by the boats, including the one-fourth previously given to the railroad.

This last contract between Morgan and the Pontchartrain Railroad Company, though made about the first of November, 1867, was not reduced to writing before the notary until the twentieth of January, 1868. By this contract, Mr. Morgan bound himself to lend the railroad company two hundred and fifty thousand dollars, and the contract contained this stipulation:

"And the said appearers further declared that it has been and is hereby agreed and stipulated between them, that although the company may hereafter receive and deliver at the proposed new depot on the levee the whole or a part of the freight shipped to or brought by Mr. Morgan's lake steamers, yet the company's proportion of the freight earnings of said steamers shall be unchanged during the continuance of the contract entered into between him and the company on the seventeenth day of April, 1866. The company is to charge all outside boats running to and from the lake end (except those running to and from the North Louisiana shore) present tariff rates."

The plaintiffs had intended putting the Creole in the Mobile trade, as she had usually been employed in the winter season, merely touching at the places on the lake shore.

As freight was the principal part of the Mobile trade, it was impossible for the Creole to run under the disadvantages imposed upon her by the railroad, under the unfair discrimination in favor of Morgan, without an inevitable loss of money. The lake trade alone, in the winter, was not sufficient to justify her running exclusively in that trade, even had there been no discrimination against her. She had been built and fitted up expressly for the navigation between New Orleans and Mobile, and was suited for no other trade. Consequently when driven from that trade she had to lie up at New Orleans, and became an almost total loss to her owners.

The present suit was brought for damages thus incurred.

## MONOPOLY CREATED.

The defendants deny that the contracts between Morgan and the Pontchartrain Railroad Company were made with the view of giving Morgan an undue preference, or of creating a monopoly. We think the foregoing statement of facts, established indubitably by the evidence of record, disproves beyond doubt the truthfulness of these denials.

It is urged by the defense that there was nothing in the contracts which prevented the Creole running.

It is true there is no express prohibition to this effect. But things may often be accomplished by indirect means as effectually as by direct. A law prohibiting, under serious penalty, all persons but one from following a certain occupation, would confer as complete a monopoly as a law giving that favored person the exclusive privilege of following that occupation. So persons may be put under disadvantages in following certain pursuits, with regard to others, which would thereafter render the occupation utterly impracticable in a business point of view. This result is obtained when it is certain a business can not be followed without serious pecuniary loss. The loss which the plaintiffs would have incurred by continuing to run the Creole was of this character. They could not pursue their business without incurring a penalty too heavy to make the trade profitable. The discrimination against them operated as a penalty and rendered their further prosecuting their business just as impossible as if it had been expressly prohibited by law, or by the contract between Morgan and the railroad company. The business a man can not follow without inevitable loss is just as much prohibited in every practicable view as if forbidden by imperial decree.

It is next contended that the plaintiffs should have run the Creole and then brought suits to recover back the money illegally exacted by the railroad company. Suppose the plaintiffs had done so, and at the end of each trip had brought suit, and had so continued for years until the legality of the charges were tested, would not the necessity for this course have been an intolerable grievance? Would not the lawyers' fees and the time lost and annoyance experienced have rendered this an inadequate relief, even if the money wrongfully exacted had been recovered back?

These exactions were not for a single instance. They were demanded for every trip of the boat until the law settled the right. How long a time would this have probably required, and how much money must have been advanced during the time to have tested this desperate experiment of recovering back money illegally exacted? It is probable it would have required years of time and an outlay of money, tens of thousands of dollars. Is it to be presumed that every person thus injured could have made the necessary advances? The proposition is simply this: A man in the honest pursuit of a lawful business is met by another party who demands of him an illegal exaction daily for permission to carry on his business. Further, suppose he has the power to stop the business unless the demand is satisfied? Is it possible that the law affords no relief to the party thus injured but to pay the illegal demand, and then sue to recover back the amount so illegally exacted? It would be a very lame and impotent administration of justice that would sanction any such doctrine.

Our adversaries allege they never refused to take any freight offered to them for the Creole.

After Mr. Pandelly's note, it would have been a very useless and idle ceremony for the Creole to have asked permission to continue

shipping freight upon the same terms extended to Mr. Morgan. This note was an active violation of the obligations of a common carrier, and no formal putting in default was required. C. C. 1926; R. C. C. 1932.

Does any one suppose that after the notice was given Mr. Pandelly would have delivered freight to the Creole without the payment of the rates charged? If any such delusion should be indulged it argues but little acquaintance with corporations and their modes of doing business.

The special defenses set up in the answer are unfounded in law or in reason, and are themselves a tacit admission of the causes of action alleged in the petition. After a review of the facts already stated, and many others in the record, we think no candid mind can fail to come to the conclusion that the contracts between Charles Morgan and the Pontchartrain Railroad Company were intended to confer upon him a monopoly, not only of the railroad, but also of the navigation between New Orleans and Mobile and the intermediate places. That those contracts did so operate, is conclusively shown by the evidence.

The Creole was driven out of the trade and left to rot at her moorings below New Orleans.

#### THE MONOPOLY JUSTIFIED.

The defendants next justify the monopoly created by their acts, by alleging it was "for the promotion of the interests of the public as well as the railroad."

We do not deny that the railroad company may have made a temporary profit by a sale of the rights of the public to Morgan. It is, however, a sufficient answer to this branch of the allegation, that the railroad possessed no such power under its charter. It was authorized by the Legislature to construct the railroad for the producing "great advantages and benefits to the said city and State generally," and not for making a pecuniary speculation by selling exclusive privileges to a particular individual. The sovereign power may, for great public motives, confer exclusive privileges, but no such power is vested in the Pontchartrain Railroad Company.

As for the other part of the allegation, we can not conceive how the public can be benefited by giving Mr. Morgan the exclusive use of the railroad and of the navigation between New Orleans and Mobile. As for the manner in which Mr. Morgan used this power, Mr. Perkins has informed us. He states that so soon as the Creole was driven out of the trade, the Morgan line raised the rates of freight and passage fare to what it had been before the reductions commenced, which were produced by the competition between the boats. That Mr. Morgan, when once in the undisputed possession of his monopoly, with all competition overcome, would have used his power to his own best advantage, is as certain that self-interest is a leading actuating motive in the character of man. To suppose to the contrary would contradict history and all human experience.

If our adversaries can succeed in establishing that the destruction of all competition by conferring exclusive rights and monopolies on particular individuals is conducive to the public interests, they will certainly be entitled to a patent for their new discovery in political economy. They will convert that into a benefit and a blessing which in all times past has proved a bane to public prosperity.

By the laws of England, monopolies were regarded and punished as crimes. Blackstone, in his chapter of offenses against public trade, says of monopolies: "These had been carried to an enormous height in the reign of Queen Elizabeth; and were heavily complained of by Sir Edward Coke in the beginning of the reign of James the First; but

were in a great measure remedied by statute 21. Jas. I., C. 3. which declares such monopolies contrary to law and void, \* \* \* and monopolies are punished with the forfeiture of treble damages and double costs to those whom they attempt to disturb." Vol. IV., chapter 12, page 159.

That monopolies created by private individuals or corporations, combinations in restraint of trade, or to prevent fair public competition, are unlawful, are against public policy, and are immoral, has been so often declared we regard argument on the point to be unnecessary. We will simply refer to the following authorities: Rev. C. C., 1892, 1895, 1847, sec. 12; Old C. C., 1886, 1889, 1841, sec. 12; Hen. Dig., 1007, sec. 6, p. 1008, sec. 9; India Bagging Association v. Kock, 14 A. 168; Piron v. Back, 10 A. 13; Merchants' Insurance Company v. Addison, 9 R. 486; 1 Story's Eq., p. 289, No. 292; Drury v. Cross, 7 Wallace, p. 305; 2 Redfield on Railways, p. 70, note 15; Sanford v. Catawissa & W. & E. R. R. Co., 2 Philadelphia Report, p. 132; Merlin, verbo Monopole, p. 397, sec. 4; Journal du Palais for 1857, p. 259; 1858, p. 618; 1859, pp. 747, 1011.

We do not understand the defendants seriously to contest the truth of the general doctrine above laid down. They seek to avoid its effect by establishing certain exceptions to the general rule, and placing their case within those exceptions.

They have introduced a mass of testimony for the purpose of showing that, in this particular instance of monopoly, the public have sustained no injury, on the contrary, have been benefited. If they established the facts as attempted, which we deny, it could not avail them in their defence. C. C., article 19: "When to prevent fraud, or from other motives of public good, the law declares certain acts void, its provisions are not to be dispensed with on the ground that the particular act in question has been proved not to be fraudulent, or not to be contrary to the public good."

It might be true, that during the pendency of this suit, or in the incipency of his monopoly, as at the time the testimony was taken, Mr. Morgan would have carefully avoided arousing public indignation by abusing the power given him; but does this prove that he never will, or that monopolies are right and legal?

The defendants also virtually assume that if the public generally were benefited by the monopoly that it was immaterial how much the plaintiffs were injured. This was charged by the judge of the district court, saying in such a case it was "*damnum absque injuria*," i. e., a loss without injury to the law, or for which the law afforded no relief.

The question presented is simply this: a party in the pursuit of an honest and lawful trade, without any fault or crime of his own, can be driven from his trade, and all the property he had necessarily used in that trade destroyed, without any compensation therefor, if in the opinion of the judge the public suffered no injury thereby. We had been taught to believe, under the Constitutions of both the United States and of the State, that vested rights could not be divested, even by the sovereign authority, without adequate compensation, and that no man could be deprived of his life, liberty or property without due process of law. That which the highest sovereignty known in this country could not do, this petty railroad corporation claims the right to do.

#### DISCRIMINATIONS BY RAILROADS.

The defendants contend that railroads may make certain discriminations, and that the one made in favor of Morgan is not illegal.

The subject of what discriminations may be made by railroads is admirably discussed in note 15 to page 70 of 2 Redfield on Railways.

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The Eclipse Towboat Company v. The Pontchartrain Railroad Company.

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The following extracts from that note will sufficiently show that the defendants' case does not come within any of the discriminations that may be legally made:

Page 72, "A railway company who advertised for carrying a certain description of goods at a lower rate of charge, when sent through certain agents, was restrained by injunction from making any such reduction."

Page 73, "Railway companies may discriminate by classes, in regard to freight or passengers, but their charges must be uniform to all persons."

Pages 74, 75, "It was decided that it was competent to a railway company to enter into special agreements, whereby advantages may be secured to individuals in the carriage of goods upon the railway, where it is made clearly to appear that in entering into such agreements the company *have only the interests of the proprietors and the legitimate increase of the profits of the company in view*, and that the consideration given to the company in return for the advantages afforded to them is adequate, and the company are willing to afford *the same facilities to all others upon the same terms.*"

In making the contract with Morgan, the railroad did not do so only for the interests of the company. Morgan was also to be greatly benefited. It was not made for the purpose of conducting the legitimate business of the railroad. It was made in consideration of a loan of money. The railroad company expressly bound themselves not to extend the same facilities to others.

The above principles are taken from both the English and American decisions. Our law, on general principle, as emphatically prohibits these discriminations as the English statutes do. Even in the absence of any express statutes to that effect, the law has been so declared in the case of *Sanford v. Catawissa and W. and E. Railroad Company*, 2 Philadelphia R. 132.

We give the extracts below as conclusive upon the case:

"The supposed necessity for such provisions in charters granted in this country and in England, proves nothing more than that the law-makers in both countries were aware of the difficulty of holding large corporations to those common obligations of justice which individuals feel bound to acknowledge without legislative enactment."

\* \* \* "The answer and the evidence show the railroad company is willing to carry the express matter of Howard & Co. in their freight trains, which go at less speed than the passenger trains, but that its purpose is to give to the International Express Company, the exclusive privilege of transportation in their passenger trains. The railroad corporation has no right to do this. The power to regulate the transportation on the road does not carry with it the right to exclude any particular individuals or to grant exclusive privileges to others. Competition is the best protection to the public, and it is against the policy of the law to destroy it by creating a monopoly in any branch of business. It can not be done except by the clearly expressed will of the legislative power. Limited means may perhaps limit the amount of business done by a railroad company, but it can never furnish an excuse for appropriating all its energies to any particular individual. If it possessed this power, it might build up one set of men and destroy others—advance one kind of business and break down another, and might make even religion and politics the tests in the distribution of its favors. Such a power in a railroad corporation might produce evils of the most alarming character. The rights of the people are not subject to any such corporate control." \* \* \*

"A regulation to be valid must operate on all alike. If it deprives

any person of the benefits of the road, or grants exclusive privileges to others, it is against law, and void."

The only authority our adversaries have been able to quote as favoring their views, is the *Fitchburg Railroad Company v. Gage et al.*, 12 Grey 393.

This was a case in which the plaintiff complained that ice was charged more freight than bricks. The court will at once perceive that this does not conflict with the foregoing authorities.

The case was decided under the statute laws of Massachusetts, and there is nothing in it which warrants the conclusion that railroads may make discriminations for the purpose of giving certain persons peculiar advantages or monopolies.

#### VIOLATION OF CHARTER BY RAILROAD.

It will be seen by a comparison of the charter of railroad company (section 9, page 292 of record, with the tariff of charges; record, page 52) that the company, in their contract with Morgan, bound themselves to charge other boats a sum far exceeding that allowed by the charter.

By the charter the railroad was limited to fifty cents per ton. This would be five cents per barrel on flour, allowing ten barrels to the ton. By the tariff demanded of the plaintiffs, flour was twenty-five cents per barrel, an increase of five times the legal rate. Other articles mentioned in the tariff were increased in the same proportion. This was a flagrant violation of the charter, and rendered the contract unlawful.

Upon this ground alone, independent of what we have previously urged, the plaintiffs are entitled to recover all the damages they sustained in consequence of the contract, and the monopoly it created.

Having thus, we think, demonstrated the illegality of the contract between the railroad company and Morgan, we shall proceed to consider the liability of the company for the damages caused by their unlawful acts.

Having disposed of all the objections urged against our right to recover any damages, we will now proceed to consider the amount to which we are entitled.

#### THE MEASURE OF DAMAGES.

The defendants contend that our suit is one for damages for the violation of a contract either express or implied, and that rules regulating the damages in such cases govern this suit. The judge of the district court charged the jury the rules which govern damages for violation of contracts, and that exemplary damages could not be allowed.

We, on the contrary, contend that the action is plainly one for a quasi offense. It is a suit for damages we have suffered from the fault of the Pontchartrain Railroad Company. C. C. 2294; Rev. C. C. 2315. We charge that the acts of that company which injured us were unlawful; were against public policy, and were immoral.

Our suit is not for damages for the violation of any express contract or quasi contract. Both the allegations in the petition and the proof in the record establish a quasi offense. There is no pretense on our part of there having been an express contract in the case. The action then must be either one on *quasi* contract or one for a *quasi offense*.

The distinction between the two is plainly enough marked in the Civil Code.

"Quasi contracts are the lawful and purely voluntary acts of a man, from which there results any obligation whatever to a third person." C. C. 2272; Revised C. C. 2293.

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The *Ellipse Towboat Company v. The Pontchartrain Railroad Company.*

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There are two principal sources which give rise to quasi contracts: "The transaction of another man's business, and the payment of a thing not due." C. C. 2273; Revised C. C. 2294.

Quasi offenses are thus defined (C. C. 2294; Revised C. C. 2315): "Every act whatever of man that causes damages to another, obliges him by whose fault it happened to repair it."

Pothier says: "These differ from quasi contracts, inasmuch as the subject of a quasi contract is permitted by law, whereas the fact which forms a delictum is something reprehensible."

Are combinations to create monopolies contracts against public policy and immoral contracts lawful, or are they reprehended by the law? We think the question too clear for argument. The charge of the district judge was erroneous, and misled the jury.

RULES FOR ASSESSING DAMAGES FOR QUASI OFFENSES.

C. C. 1928, Rev. C. C. 1934, section 3: "Although the general rule is that damages are the amount of the loss the creditor has sustained, or of the gain of which he has been deprived, yet there are cases in which damages may be assessed without calculating altogether on the pecuniary loss or the privation of pecuniary gain to the party." \* \* \* "In the assessment of damages under this rule, as well as in cases of offenses and quasi offenses and quasi contracts, much discretion must be left to the judge or jury."

This rule has been applied by our courts to a very great variety of actions, where the damages could not be established with accuracy. For instance, in actions for libel, slander, trespass, all kinds of torts, where a child sues for the killing of the father by public carriers, and such cases generally. In none of these cases could the damages be proved with certainty.

The courts have further recognized the right to inflict punitive or exemplary damages in a great number of instances, and in some where none could be proved. There never was, perhaps, a case more imperatively calling for exemplary damages than the one now before the court. Corporations chartered for the public generally should be severely taught not to use their franchises for the making of monopolies. We here append a list of some of the cases in which the foregoing principles have been maintained: *McGarvey v. City of Lafayette*, 12 R. 678 *et seq.*; *Frank v. Carrollton Railroad Company*, 20 An. 25; *Pyke & Co. v. C. Doyle & Co.*, 19 An. 362; *Fellows v. High*, 7 An. 452; *Steinson v. Buisson*, 17 L. 567; *Grant v. McDonogh*, 7 An. 447; *Hen. Dig. verbo Libel and Slander*; *Dyke & Aurlburt v. Walker*, 3 An. 69.

Pothier, after stating the rules applicable to damages for violation of contracts, says these principles do not apply to cases of fraud, "for a person who commits a fraud obliges himself, *velit nolit*, to the reparation of all the injury which it may occasion; for instance, if a person sells me a cow which he knows to be infected with a contagious distemper, and conceals this view from me, such concealment is a fraud on his part which renders him responsible for the damages that I suffer, not only in that particular cow, which is the object of the original obligation, but also in any other cattle to which the distemper is communicated, for it is a fraud of the seller which occasions this damage." Pothier I. C. 2, art. 3.

By our Civil Code damages from fraud or quasi offenses are classed together, as being governed by the same rules. C. C. 1928, sec. 3.

Taking the foregoing rules for our guide in assessing the damages we are entitled to claim, let us apply them to the case to ascertain as nearly as possible the amount of damages due to plaintiffs.

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## AMOUNT OF DAMAGES.

Taking it for granted that the court will award damages sufficiently serious to prevent a repetition of the offense, and that the plaintiffs will be restored to the undisturbed possession of their legal rights, we will make our calculation upon that basis.

If we exclude from the calculation an estimate of the loss of gain, although the Civil Code expressly sanctions the claim, and take another basis of calculation, we shall find the following result:

Interest at eight per cent. on the cost of the Creole, \$91,000 for three years.....	\$21,800
Depreciation on the value of the vessel, ten per cent., per annum for three years.....	27,300
Loss in summer 1868.....	1,080
Expenses when lying up.....	7,300
Lawyer's fees.....	2,500
Time, trouble, etc., attending to suit.....	2,000
Amount of loss.....	<u>\$61,980</u>

The plaintiffs know they have been damaged to a very large amount. We ask the Court to award them such damages as will to some extent reimburse them for the very serious losses they have sustained, or tell us plainly that the combination between the defendants and Morgan, and monopoly conferred thereby, was lawful and proper.

Howe, J. The plaintiffs alleged themselves to be the owners of the steamboat Creole, a vessel built for the Mobile and lake trade. They charged that the defendants had "entered into an alleged combination with one Charles Morgan to deprive the public generally of the benefits of said railroad, with the view of conferring on the said Morgan a monopoly of the freight and passengers transported over the said railroad, making an unjust and illegal discrimination in his favor in the price charged by the railroad for the transportation of freight and passengers. Further, that said combination was also intended to confer upon the said Morgan a monopoly of the carrying of freight and passengers by means of the navigation of the waters by vessels running between New Orleans and Mobile, and the various places situated on the shores of the lakes."

That an undue and unlawful preference was made in favor of Morgan, and that by reason of this and the other facts and figures recited in their petition, they have suffered damages in the sum of \$100,000.

The defendants answered by a general denial; by a special denial of any undue preference or monopoly; that the arrangement complained of was made to secure at all seasons the services of an efficient and reliable line of steamers in connection with their terminus on the lake, and was made in good faith and for the promotion of the interest of the public, as well as of themselves.

They denied any notice of plaintiffs' desire to put the Creole into the Mobile trade, any exclusion of her from a connection with the



railroad, or any refusal to carry freight for her, and averred that the withdrawal of the Creole from the trade, prior to the commencement of the suit, was a voluntary and prudent retirement from a losing trade during the winter season, and was not productive of any loss or damage to the plaintiffs.

The plaintiffs prayed for a jury of merchants, and the trial before such jury resulted in a verdict in their favor for the nominal sum of \$100, and plaintiffs alone appealed.

There is no proof of any of plaintiffs' allegations in regard to carriage of passengers, and that branch of their complaint may be dismissed.

As to the carriage of freight, it appears that on the seventeenth April, 1866, Morgan entered into a contract with the railroad, by which it was stipulated that he "or his agent shall, during the said term" (i. e., five years), "have the right to charge such prices for carrying freights between New Orleans and Mobile or intermediate ports as they may deem best for the mutual interests of the parties; and the Pontchartrain Railroad Company, for its services thus performed, shall be entitled to charge and collect from the said Charles Morgan or his agent, instead of detailed freight charged by the tariff as heretofore, one-quarter of the total amount of freight moneys which the said steamers may charge for freights thus mutually carried by the parties hereto."

No complaint is made of this agreement. The plaintiffs made the same for their boat, the Creole, and the same was entered into with the steamer Camelia.

The defendants, however, found that this arrangement did not work well for them. The price of freight charged by the Creole, for example, in April, 1866, was fifty cents a barrel, of which the railroad received twelve and one-half cents. During the summer she put her price down to fifteen cents, as did the other steamers, and the railroad got but three and three-fourths cents. They therefore made a new arrangement, and about the first November, 1867, agreed with Morgan that he should loan them \$250,000, for the purpose of extending their road up the levee and building new depots, and they in turn would continue the arrangement for dividing through freight only with him; charging other steamers the regular tariff rates, as charged to the rest of the public. This stipulation was embodied in the act of mortgage to secure the loan, as follows:

"And the said appearers further declared that it has been and is hereby agreed and stipulated between them, that although the company may hereafter receive and deliver at the proposed new depot on the levee the whole or a part of the freight shipped to or brought by Mr. Morgan's lake steamers, yet the company's proportion of the

freight earnings of said steamers shall be unchanged during the continuance of the contract entered into between him and the company on the seventeenth day of April, 1866. The company is to charge all outside boats, running to and from the lake end (except those running to and from the north Louisiana shore) present tariff rates."

On the second of November, 1867, the defendants notified the agent of the Creole that on and after the fifteenth of that month all freight for her would be charged tariff rates. On the tenth of November, 1867, the Creole was laid up, and on the twelfth February following this suit, with its enormous claim for damages, was begun.

The Creole was sixteen years old at this time. Her cost to plaintiffs was \$35,000; her tonnage 396 tons. Morgan placed on the route three steamers; aggregate tonnage, 2800 tons, and cost \$585,000.

We do not find that the defendants have joined in the appeal, and the judgment must, therefore, stand unless the plaintiffs are entitled to have its amount increased in accordance with the claims they make in their petition and the views of the law they have urged in their argument.

The plaintiffs sue, of course, in enforcement of some supposed legal obligation, and the question at once presents itself whether any such obligation exists. It is not pretended that it springs from any contract or quasi contract or from the operation of the law. It must, therefore, result, if any existence it have, from some offense or quasi offense committed by the defendants—from some injury or neglect on their part. But as neglect is evidently out of the question, we must conclude that the alleged obligation springs from a supposed offense and that the plaintiffs claim under that general principle expressed in article 2315 Rev. C. C., that "every act whatever of man that causes damage to another obliges him by whose *fault* it happened to repair it."

There is no room for doubt at the present time as to the meaning of this language. It is copied literally from the Code Napoleon and has been the subject of numerous decisions and abundant commentary. The phrase "every act" is controlled by the word "fault," and it results that the party bound must be in fault; that is to say his conduct must be, in the general sense of the word, unlawful. No one can be held liable for the regular and prudent exercise of a legal right that belongs to him. He does not commit a fault by making use of a right. *Nullus videtur dolo facere qui suo jure utitur.* L. 55, ff. de reg. jur. And he alone causes a legal inquiry who does what he has not a right to do. *Nemo damnum facit, nisi qui id facit quod facere jus non habet.* L. 151, ff. de reg. jur. These principles are elementary, and we merely paraphrase the language of the jurists from Gaius and Paulus down to the latest commentator.

And these principles are especially applicable to the competitions of modern commerce. "To him that hath shall be given, and from him that hath not shall be taken away even that he hath." One man by rare powers of combination acquires capital, and by its use builds up a business which dwarfs and finally kills the trade of his less fortunate neighbor. We may pity the weaker merchant, but we can not mulct the stronger one in damages. The great law of "natural selection" is something we can not repeal, and "the fittest survive," and always will.

The case is narrowed, then, to the inquiry whether there was anything unlawful and legally injurious to plaintiffs in the agreement made by the Pontchartrain Railroad Company with Charles Morgan, by which, in the language of their trade, they "pro rated" the through freight with him to and from New Orleans and Mobile, and declined to further pro rate with plaintiffs. We can not perceive anything illicit in this agreement. The plaintiffs do not pretend that the railroad charged them, or the public generally, too much, but that it charged Morgan too little. What law did they violate in so doing? No statute of Louisiana has been infringed; none is quoted by appellants except the charter of the company, and that is silent on the subject. No rule of jurisprudence has been violated, so far as we can perceive. The company is a juridical person; its special business is to make contracts in regard to freight, and what is there to prevent it from making an agreement by which a large loan is secured to enable it to extend its road and build its depots, and by which a daily line of fine steamers is secured to connect its short route with the great highways to the East and North? And what is there to prevent its declining to "pro rate" with the Creole and Camelia, when it found that the effect of pro-rating with several lines was to enable them to engage in the game of competition at the railroad's expense?

The plaintiffs never offered to loan the railroad a quarter of a million of dollars, or any other sum; the plaintiffs never offered to establish a daily line of large swift steamers; they call their own vessel the "poor little Creole." Why should they complain, then, if the company chooses to avail itself of the great advantages offered by Morgan? But above all, why should they complain if the railroad refuses to "pro rate" with them when it is not bound to pro rate with any one?

The plaintiffs cite, as in their favor, a number of cases recently decided in the English courts, and particularly those collected in the note 15 to page 70 of volume 2, Redfield on Railways. But these decisions were made under the stringent provisions of railway traffic acts of Parliament, and, as has been remarked by the Supreme Court of Massachusetts, (12 Gray, 398,) "throw very little light upon questions concerning the general rights and duties of common carriers." Yet even with the peculiar and stringent provisions of the English

legislation on the subject, it has been there decided that "it is competent to a railroad company to enter into special agreements whereby advantages may be secured to individuals in the carriage of goods, where it is made clearly to appear that in entering into such agreements the company have only the interest of the proprietors and the legitimate increase of the profits of the company in view, and that the consideration given to the company in return for the advantages afforded is adequate, and the company are willing to afford the same facilities to all others upon the same terms." Redfield on Railways, volume 2, pages 74, 75, citing *Nicholson v. G. W. Railway*, 5 Com. Bench, N. S. 366.

The better opinion seems to be, that in the absence of special statutes a railway corporation is in the matter of freight contracts governed by the general law of common carriers. Redfield on Railways, volume 2, page 117; *Sewell v. Allen*, 6 Wend. 335; *Citizens' Bank v. Nantucket Steamboat Company*, 2 Story 16; *Fitchburg Railroad Company v. Gage*, 12 Gray, 393.

In the last case, which is directly in point, the Supreme Court of Massachusetts said of the common law in regard to carriers: "The principle derived from that source is very plain and simple. It requires equal justice to all. But the equality which is to be observed in relation to the public and to every individual consists in the restricted right to charge in each particular case of service a reasonable compensation, and no more. If the carrier confines himself to this, no wrong can be done, and no cause afforded for complaint. If for special reasons, in isolated cases, the carrier sees fit to stipulate for the carriage of goods or merchandise of any class for individuals for a certain time, or in certain quantities, for less compensation than what is the usual, necessary and reasonable rate, he may undoubtedly do so, without thereby entitling all other persons and parties to the same advantage and relief."

On the whole, we see no reason to increase the judgment in this case. Judgment affirmed.

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TALIAFERRO, J., *dissenting*. I am of the opinion the plaintiff ought to recover damages. The judge's charge to the jury, I think, is in regard to an important point erroneous, and I make no doubt the jury was misled by it. The Pontchartrain Railroad Company, as its charter shows, is vested with large powers and advantages. It virtually has a monopoly in the transportation, both ways, of all merchandise passing between the lake and New Orleans. Everything entering into the important commerce between that city and Mobile must necessarily go over their road. I consider that this company, endowed by the Legislature with such large privileges, is impliedly bound to the

community at large to deal fairly with all who are interested in the extensive business it is engaged in as a public carrier. This implied obligation has not, in my view, been complied with. I find from the evidence in the record that prior to the fifteenth of November two or three years, a strong competition existed between what is called the Morgan steamers and others on the lake, and among them the Creole, belonging to the towboat company, the plaintiffs in this case. I find it in proof that up to the time mentioned the Creole withstood this competition, and with less detriment therefrom than the boats of the Morgan line. It is shown that the company published a tariff of prices for the carriage of goods, to go into operation on the fifteenth of November, 1867. All were required to pay the prices so fixed, *who did not ship* to and from the lake terminus of the railroad by the Morgan line of steamers; but those who did ship by the Morgan line were not required to pay them, and were charged vastly less for their transportation. The discrimination was very large, and evidently intended by the company to enable the Morgan line of steamers to grasp the entire carrying trade through the lakes, by excluding the boats of the plaintiff, an object which the evidence satisfies me the Morgan steamers had previously been unable to do by fair competition. I believe it to be against equity and conscience to give, as this company has avowedly done, undue preferences to one party to injure another. Not even the plea that circumstances may justify the violation of individual right to promote the general good, can be interposed in this case. The evidence is that the prices of transportation by the Morgan steamers were raised shortly after they got rid of the competition that had been kept up previously by the boats of the plaintiffs, a result naturally and certainly to be expected. I think this a case in which exemplary damages should be awarded to redress a private wrong, and to vindicate public justice.

A judgment rendered recently in the State of Maine upon a state of facts very similar to those presented in this case sustains the views I have expressed. The case in Maine was this: "The defendant, a railroad company, whose charter authorized its directors to make rules for the transportation of freight and passengers, one of which was that freight should be carried only on freight trains, contracted with the Eastern Express Company to give the latter a certain space in the baggage car attached to its passenger trains for the carriage of their goods, and agreed not to let a similar space in such a car to any other express carrier during the continuance of the contract. Plaintiff, another express company, offered packages to be transported upon defendant's passenger trains, when and where the Eastern Express Company loaded their freight, and defendant refused to receive them. Held, that plaintiff might maintain an action of damages for such refusal." American Law Review for April, 1871, page 483.

## No. 3494.—STATE ex rel. JOHN W. HILLMAN v. ANTOINE DUBUCLET, State Treasurer.

The writ of mandamus can not be invoked by a creditor of the State to compel the State Treasurer to make a certain distribution of funds, not yet in his hands, as they may be received by him.

An order of court directing the Treasurer to register and pay warrants drawn on the State treasury in the order of registration, with funds thereafter received, is an abuse of the judicial power, and null and void.

A mandamus will only lie in such a case to compel the Treasurer to pay demands on the treasury when the funds are in his hands.

**A** PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. John B. Howard*, for plaintiff and appellee. *Samuel P. Blanc*, for appellant.

WYLY, J. The motion to dismiss the appeal is refused.

The relator, alleging that he is the holder of \$67,000 in State warrants on the general fund, avers that prior to this suit he "has brought suit both by injunction and by mandamus to retain money in the State treasury" to pay him; that he again made demand upon the State Treasurer, requesting him, "Antoine Dubuclet, to register the warrants of relator as aforesaid, to the amount of \$67,000, in a book in his office, to the end that the warrants of the relator may be accordingly paid out of the first moneys coming into the treasury to the credit of the general fund; but the said Treasurer, Antoine Dubuclet, refused the request of relator, and refused to register the warrants of relator without any lawful excuse, and in the denial of the right of the relator, to his great danger, loss and injury, from which he had no relief by ordinary process of law," and therefore prayed for a writ of mandamus.

No answer seems to have been filed. The court, however, gave judgment, rendering the mandamus which was issued peremptory, commanding A. Dubuclet, State Treasurer, "forthwith to register the warrants of the relator, and before registering any other warrants; and, further, that said respondent, A. Dubuclet, State Treasurer, pay moneys only on registered warrants, and that he pay said registered warrants in the order and according to the date of such registry, and that he forthwith pay the warrants of the relator in the order in which they are registered."

From this judgment the State Treasurer has not appealed.

The appellant is Jules A. Blanc, who alleges that he is the holder of \$6721 in State warrants, and is aggrieved because of the preference given the relator over him and other holders of warrants, and because said judgment is unauthorized by law.

It is very evident from the allegations of the petition that no ground whatever is shown for the mandamus. It is not pretended that the State Treasurer had funds at the time he refused to pay the warrants

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State ex rel. Hillman v. Dubuclet, State Treasurer.

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presented by the relator. It was no part of the duty of the Treasurer to detain funds which might come into his hands in the future in order to pay the relator, in preference to others presenting warrants on the general fund. Revised Statutes of 1870, section 3784.

The fact that the relator presented his warrants once or twice when there was no money in the treasury, would give him no advantage over others when there might be funds.

A mandamus will not lie to compel the State Treasurer to make a certain distribution of money not yet received by him. Until he has received the money and refused to make the application thereof, as required by law, there is no failure of duty. And it is only the failure of a ministerial duty that justifies the issuance of the writ of mandamus. The district judge was wholly unauthorized to prescribe rules for the administration of the State Treasury, and to enforce them by mandamus.

The relator showed no ground for the issuance of the writ; he used the process of the court for an illegal purpose, and we regret we are not authorized to impose on him exemplary damages.

As to the State Treasurer, we deem it proper to remark that it is strange, to say the least, that he yielded so tamely, and without the slightest resistance to this unwarrantable proceeding against him.

Let the judgment appealed from be annulled; let the mandamus be disallowed, and the relator's petition be dismissed, with costs of both courts.

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No. 2423.—C. A. & L. L. CONRAD v. E. W. BURBANK.

A judgment may be rendered, on motion, at any time after suit is instituted on such items of an account as are admitted to be correct by the defendant, reserving the right of the defendant to contest items not admitted. In such a case, legal interest may be recovered on the items admitted from the date of their admission.

**A**PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. C. M. Conrad & Son*, for plaintiffs and appellees. *Fellows & Mills*, for defendant and appellant.

HOWELL, J. Two questions are presented in this proceeding, to wit:

*First*—Can a judgment be rendered, on motion, for the amount of the original demand admitted to be due, reserving to plaintiffs the right to prosecute their claim for the balance?

This is no longer an open question. The amount admitted is not a matter of dispute, and the only issue to be tried is the sum not admitted. The plaintiff is at any time after the admission is made, entitled to a decree for such amount as confessed. The fact that the admission is made upon an account consisting of various items, no one or more of which are specially admitted to be due and correct, does

24	17
108	719
24	17
108	180

not affect the question. The defendant is supposed to have presented his claim and rights in the most favorable light to himself. 4 R. 144; 5 R. 447; 11 An. 746.

*Second*—Can interest be allowed on the amount admitted when it is not specially included?

This, too, has been settled affirmatively. 4 R. 144; 2 An. 441. By the law all debts bear interest at the rate of five per cent. from the time they become due, unless otherwise stipulated. R. S., § 1883. To be relieved from payment of this interest, it was incumbent on defendant to allege a tender made in accordance with law. C. P. 404, 407, 413, 415; R. C. C. 2167, 2168. The vague allegation that he "tendered to plaintiffs the balance of the amount due to them by said accounts, which said plaintiffs refused to receive unless respondent would accept from them a receipt in a prescribed form," does not show how the tender was made, nor relieve defendant from liability for interest.

Judgment affirmed.

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No. 6758.—P. H. WILLARD, Agent, v. G. LUGENBUHL and F. ECROT.

A plaintiff who brings suit in his own name as agent is bound to disclose the name and residence of his principal. The fact that a defendant has signed a release bond as security in an attachment suit wherein the plaintiff appeared as agent without disclosing the name of his principal, does not estop him from excepting to the action, on the ground that the plaintiff, as agent, failed to disclose the name of his principal.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Howell, J. Race & Foster*, for plaintiff and appellee. *E. K. Washington*, on the same side. *E. Filleul*, for defendants and appellants.

WYLY, J. The plaintiff, styling himself agent, without disclosing the name of his principal, brings this suit against G. Lugenhuhl as surety on a release bond subscribed by him, and also sues to annul the sale of certain property made by said Lugenhuhl to F. Ecrot, charging that this sale was fraudulent and simulated, and was contracted for the purpose of enabling the said Lugenhuhl to put his property beyond the reach of the plaintiff, his creditor.

The defendants excepted to the action because the plaintiff did not disclose in his petition for whom he was suing as agent; that "being *non persona juris* he is neither entitled to an action in his name individually nor in the name of a principal unknown to the tribunal, and therefore not able to possess any active or passive rights."

The exception was overruled, and on final hearing the court gave judgment for the plaintiff. The defendants appeal.

We think the court erred in dismissing the exception of the defendants and allowing the plaintiff to stand in judgment without disclosing the name of the party for whom he was suing. A party may sue as



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Willard, Agent, v. Lugenbuhl and Ecrot.

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principal or he may sue as a fiduciary; but if he appears in the latter capacity he must disclose the name of the real plaintiff in the action. The petition must mention the name, surname and place of residence of the plaintiff. C. P. 172.

But it is urged that the defendant, Lugenbuhl, ought not to complain of the manner of plaintiff's appearance, because he signed the release bond as security in an attachment suit in which the plaintiff appeared, as he now appears, without mentioning the name of the party for whom he is agent.

This is no reason why the name of the owner of the claim sought to be enforced should be withheld. An irregularity in one action will not justify it in another.

The defendants are sued on the bond signed by Lugenbuhl as security and judgment is prayed against them in favor of the plaintiff as agent.

They ought to be informed in the petition of the name of the party summoning them to trial.

Let the judgment appealed from be annulled and let the suit be dismissed at the costs of the petitioner in both courts.

Mr. Justice Howell is recused in this case.

No. 3614.—STATE ex rel. N. A. ROBINSON, District Attorney, and M. D. EDMONDSON v. WILLIAM W. MCNEELY.

A commission issued by the Governor appointing a person to an office not vacant, is an absolute nullity and confers no title whatever in the appointee to the office.

The Governor has no power under the Constitution to destitute a constitutional officer of his office. Such offices can only be vacated in the manner pointed out by the Constitution and the laws.

**A**PPEAL from the Ninth Judicial District Court, parish of Natchitoches. *Orsborn, J. Dennes & Belden*, for relators and appellees. *Jack & Pierson, C. Chaplin & Son* and *J. F. Smith*, for defendant and appellant.

WYLY, J. The relator, M. D. Edmondson, proceeding under the intrusion act, complains that the defendant has intruded into the office of parish judge of the parish of Sabine, which office belongs to the relator by virtue of his election at the November election of 1870 and to which he was duly commissioned and qualified.

The defendant's title to the office is the appointment and commission from the Governor, dated seventh March, 1871.

The court gave judgment for the relator, declaring him the lawful incumbent of the office. The defendant appeals.

There is no doubt that the relator, M. D. Edmondson, is the lawful incumbent of the office in question. He was duly elected and qualified, receiving his commission from the Governor, dated thirty-first December, 1870.

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State ex rel. Robinson, District Attorney, and Edmondson v. McNeely.

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It is not pretended that he has resigned or has been removed by address or impeachment. It appears as a matter of fact that the commission to the defendant was issued by the Governor in error, the Governor having been led to suppose that the plaintiff had left the State permanently and thus abandoned his office.

It is well settled that a constitutional officer can not be destituted of his office except in the manner provided in the Constitution, and that the appointment to an office not vacant gives no title thereto.

It results, therefore, that the appointment of the defendant on the seventh March, 1871, did not divest the lawful incumbent of his title to the office by virtue of his commission issued December 31, 1870. State ex rel. Downes v. Towne, 21 An. 490.

Judgment affirmed.

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No. 2482.—ROBERT P. SMITH v. THE CITY OF NEW ORLEANS.

If the record of appeal contains no note of the evidence offered in the court below, the appellate court will presume that the court *a qua* proceeded upon proper evidence.

In reference to the question of bills of credit, the doctrine announced in the case of Smith v. City of New Orleans, 23 An., page 5, is affirmed by this decision.

**A** PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Alexander Walker*, for plaintiff and appellee. *J. R. Beckwith*, City Attorney, for defendant.

**TALIAFERRO, J.** The plaintiff brings this suit to recover from the defendant \$600, being the amount of thirty bills or notes of the currency known as "city money," with interest from judicial demand. The defendant answers:

*First*—That the notes sued on are bills of credit, which the city, by the Constitution of the United States, was prohibited from issuing.

*Second*—The making and circulating these notes or bills of credit were in express violation of certain acts of the General Assembly of Louisiana, and therefore void.

The defendant offers another objection, which he contends must prove fatal to the plaintiff's case, and that is that the notes sued upon were not offered in evidence on the trial, and that the record does not show that any evidence was introduced.

The plaintiff had judgment, and the defendant appealed.

This court has held that where it finds no note of evidence in the record, it will presume the court *a qua* proceeded upon proper evidence. 23 An., page —. This case presents the same issues as that of the same plaintiff v. The City of New Orleans, 23 An., page 5.

For the reasons assigned for the decree in that case, it is ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

24	20
50	646
24	20
52	710
24	20
117	790
24	20
123	841

## No. 2388.—JOHN BIETRY v. CITY OF NEW ORLEANS.

Contracts legally entered into have the effect of laws on the parties who have formed them.

An agreement made between the city of New Orleans on the one side and a contractor on the other, whereby the city reserves the right to discontinue and annul the contract, whenever it shall appear that the contractor has failed to comply with the terms and conditions of the contract, may be annulled and set aside by the city without putting the contracting party in default, if it be shown that he has failed to comply with the terms and conditions imposed upon him by the contract.

**A**PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. J. B. Cotton*, for plaintiff and appellee. *George S. Lacey*, City Attorney, for defendant and appellant.

LUDELING, C. J. The plaintiff alleges that he entered into three contracts with the city of New Orleans to clean and repair certain streets in the fourth, fifth and sixth wards of the city (comprising the whole of the second district) for three years from the first of September, 1866, agreeably to the specifications contained in the agreement; that he was to receive, per annum, for the fourth ward \$6600; for the fifth ward \$7550, and for the sixth ward \$6740, and that by reason of the violation of the contract by the city the plaintiff "abandoned the work" on the eighteenth day of February, 1867. It is further alleged that at the time this suit was commenced, there was due to the plaintiff by the city of New Orleans the sum of \$3053 50, being made up of the amount then due under the contracts, and the ten per centum retained by the city, on payments already made, \$5831 21 on account of loss on mules, carts, etc., purchased by petitioner to carry on the contracts, and \$24,000 damages, occasioned by loss of profits, which plaintiff would have realized.

The answer admits the contracts, but represents that the plaintiff failed in every respect to comply with the terms and specifications thereof; that the contractor was executing the contracts in a manner which dissatisfied the Council, and that in conformity with one of the stipulations of the contracts the Council annulled the agreement without indemnity.

There was judgment in favor of the plaintiff for \$26,497 14, and the city has appealed.

The evidence shows that on or about the eighteenth of February a demand of the sum, alleged to be due for work done, was made on the Mayor of the city by a notary, for the purpose of putting the city in *mora*, and that the city refusing to pay, the plaintiff abandoned his contracts. The evidence further shows that shortly thereafter the City Council annulled the contracts with the petitioner, on the ground that he had failed to execute the contracts in accordance with the terms and specifications of said contracts. It becomes necessary, therefore,

to determinè the question of fact, did the plaintiff execute the contracts in accordance with the terms and specifications thereof?

There is a great deal of conflicting testimony in the case; but after a careful examination of the evidence, we are convinced that the weight of evidence preponderates in favor of the defendant.

L. H. Pilié, a witness for plaintiff, says: "I have been employed in the city surveyor's department for about thirty years, either as deputy or chief. In that capacity I have had daily communication with the contractors for that department, and am, therefore, able to say when a contractor does his duty under his contract."

Question. "As surveyor, then, of the city of New Orleans, were you satisfied with the condition in which he kept these streets?"

Answer. "Sometimes I was."

Question. "I mean at the time this rainy spell set in?"

Answer. "No; as I said already, the unpaved streets back there were in bad order."

James McClosky, a witness for defendant, says: "I was chairman of the Committee of Streets and Landings of the Upper Board. It was my duty as chairman to examine the condition of the streets and the work of the contractors, to see if they performed their duties. \* \* I went two or three times over this district when I heard the complaints, and the time when I made the closest examination was when I went with Pilié and McKnight. There was, at the time I made these examinations, complaints of the work of all the contractors from all parts of the city. These wards, the fourth, fifth and sixth, were all in a very bad condition, and particularly the back parts of them. The gutters were filled up with mud; the middle of the streets were in big holes; the gutters of some of the paved streets looked as though they had not been touched for a long time. \* \* Some of the streets we had to go round—driver said we could not go through. The general appearance of the streets were bad. They looked as if they had not been worked for a long time. In some of the paved streets there were piles of dirt that had been taken out of the gutters and had not been removed, and grass was growing on them. I reported these facts to the Council, and refused to sign the certificates for the work done. \* \* It is within my knowledge that the contract of Bietry with the city was canceled by the Common Council, because the contract was not well done."

H. T. Sturken says he was a member of the Committee on Streets and Landings when Bietry had the contracts to clean the streets, etc. Says he was a member of the Common Council when the contract was annulled, and that he voted to annul it. He testifies that "there was at that time a general complaint from all parts of the city as to the

condition of the back portion of the city, and the manner in which the contracts were carried out."

J. B. Prague testified that he was chairman of the Committee of Streets and Landings of the Board of Assistant Aldermen; that the Committee on Streets and Landings refused to approve the certificates for work because the contractor had failed to comply with the terms of his contract, and *that they ascertained the fact by examination*, and that he reported the facts after examination to the Common Council. He states that some objections were made to the report in the Council, and the matter was proposed to be referred back to the Committee on Streets and Landings, but he moved that the matter be referred to a special committee to be appointed by the board, which was done. This committee was composed of Messrs. Kaiser, Montamat, Sturken and himself; that the committee reported that the streets were in a bad condition, etc., and the report was approved by the Council. That about that time there was a change of administration, and a new Committee of Streets and Landings were appointed, who refused to approve the certificates, and the City Council annulled the contracts on account of the failure of Bietry to perform the duties imposed by the stipulations of the contracts.

Under this state of facts, we think the City Council had the right to annul the contract, without putting the plaintiff in default, and without indemnity, under the following clause, which forms a part of the contracts between the parties, to-wit:

"In all contracts adjudicated by the Controller, one of the conditions shall be, (to be stated by him at the time of the adjudication, and *inserted in the specifications*, if any be published), that in case of failure by the contractor to begin or finish the work within the period fixed, or *in case the Council be dissatisfied with the manner in which the work is being executed*, the Council shall have the right to annul the said contract without putting the contractor in default, and without applying to a court of justice to annul the same, and WITHOUT INDEMNITY; and, also, that in case the contractor shall at any time abandon any work or undertaking, or not finish and complete the same in conformity with his contract, such contractor shall forfeit all claim he may have for any work or undertaking done by him up to the date of such abandonment, and such sum as may have been deposited in the treasury by such contractor, *and the city shall be hereby discharged and released from any and all liability therefor*; and that in case such work or undertaking be resold, the contractor and his surety or securities shall be held and bound *in solido* to pay unto the city all such loss or difference between the price at which such contractor originally contracted to perform the work or undertaking and the price at which it may be adjudicated at a resale or readjudication."

Bietry v. City of New Orleans.

These stringent provisions were stipulated in view of the public interests, and there is no law which forbids their enforcement, and having assented to them they are the laws unto the parties to the contract. "Agreements legally entered into have the effect of laws on those who have formed them." C. C., article 1895; 14 An. 296; 19 An. 7; C. C. 2113, 2116.

It is therefore ordered and adjudged that the judgment of the district court be avoided and reversed, and that there be judgment in favor of the defendant rejecting the plaintiff's demand, with costs of both courts.

Rehearing refused.

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No. 2310.—SUCCESSION OF GEORGE ALLAN v. JEAN B. COURET et als.

Objections to the legality of notice of seizure in a proceeding under an order of seizure and sale, must be urged within five years from the date of the service of such notice. Act of tenth of March, 1834, page 123.

**A**PPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. James McConnell and Walter Rogers*, for appellants. *E. W. Huntington, O. Roselius & Alfred Phillips, E. T. Fellows, Race, Foster & E. T. Merrick*, and *Fellows & Mills*, for appellees.

LUDELING, C. J. On the twenty-first of October, 1856, an order of seizure and sale was obtained against the property of George Allan. On the next day following the notice required by article 735 of the Code of Practice was served upon George Allan personally; but for some reason not explained in the record, no seizure was made of the property until January, 1858. *A notice of seizure* was served on the wife of said Allan on the eleventh February, 1858, the said Allan *being sick in the house at the time*. The property was publicly adjudicated on the twentieth March, 1858, after due advertisements, to James M. Forgay and Henry Bier, who subsequently sold it to J. B. Couret and J. C. Stevenson, the defendants in this cause.

On the twenty-fourth of January, 1868, this suit was instituted to set aside the sheriff's sale, on the ground that there was no legal service of the notice of seizure, because the defendant, George Allan, was, at the time of the service of the notice of seizure, an interdicted person, and as such incompetent to receive such notice.

Conceding, for the sake of argument, that this notice of seizure is required by law, the improper service or lack of service of the notice of seizure was *an informality*, which has been cured by the lapse of five years under the act of tenth March, 1834, section 4, page 123. The plea of prescription of five years must be sustained.

It is therefore ordered that the judgment of the district court be affirmed, with costs of appeal.

Rehearing refused.

No. 3386.—SUCCESSION OF JOHN M. NELSON.—Opposition of JANE HAYGOOD to Tableau of Administrator.

Legal or tacit mortgages allowed by law are inoperative against third persons unless they have been recorded in the manner provided by law. Constitution, article 123, act No. 95 of 1869; 22 An. 278.

Article 123 of the Constitution, and the act No. 95 of 1869 to enforce it, do not impair the obligations of contracts. These provisions of the Constitution and the laws of the State on the subject are not therefore in conflict with section ten of article one of the Constitution of the United States.

**A**PPEAL from the Parish Court of Jefferson. *William Kern*, Parish Judge. *A. Commandeur* and *M. Grivot*, for Mrs. Nelson, administratrix, appellee. *G. L. Hall*, for opponent and appellant.

WYLY, J. Mrs. Eliza J. Nelson, widow of John M. Nelson and administratrix of his succession, filed her account and placed herself as a creditor for the amount of \$4402 50 for paraphernal funds received by her husband, claiming the rank of a mortgage creditor for said amount.

Mrs. Jane Haygood, an ordinary creditor, opposed this item of the account, alleging that "it is not a debt due by the succession of John M. Nelson which can be recovered as an ordinary or privilege claim, and the succession of Nelson owes no such amount."

The court recognized Mrs. Nelson as a mortgage creditor for the amount claimed by her, and dismissed the opposition. The opponent has appealed.

The facts that establish the claim of Mrs. Nelson are admitted. The only issue is whether or not Mrs. Nelson is entitled to the rank of a mortgage creditor, having failed to record her tacit mortgage prior to the first of January, 1870.

Article 123 of the Constitution of 1863 declares that "the General Assembly shall provide for the protection of the rights of married women to their dotal and paraphernal property, and for the registration of the same; but no mortgage or privilege shall hereafter effect third parties unless recorded in the parish where the property to be effected is situated. The tacit mortgages and privileges now existing in this State shall cease to have effect against third persons after the first day of January, eighteen hundred and seventy unless recorded. The General Assembly shall provide by law for the registration of all mortgages and privileges."

On the eighth of March, 1869, an act was passed to carry into effect this article and to provide for recording mortgages and privileges, being act No. 95 of the acts of 1869.

In *Taylor et al. v. Ealer*, 22 An. 278, a case directly in point, this court said: "By operation of the Constitution and the act of 1869, the tacit mortgage may be preserved if recorded before the first of

January, 1870, in the manner directed by law. A failure to inscribe it is fatal. The inscription was within the power of the plaintiff, whose interest it was to make it, and she has no just ground of complaint if, through negligence or ignorance, she has failed to preserve a preference conferred on her by law, in derogation of common right."

But it is contended that if the tacit mortgage of the surviving widow is lost by reason of article 123 of the Constitution of 1868 and act No. 95 of the acts of 1869, the obligation of a contract has been violated by the State, in contravention of section ten of article one of the Constitution of the United States. To this proposition we can not assent. The obligation of the husband to restore the paraphernal funds he has received from his wife, based upon a quasi contract, is in no manner impaired by article 123 of the Constitution and act No. 95 of the acts of 1869. The law requiring the registry of the tacit mortgages accorded by the civil law, appertains to the remedy.

"Although there is a distinction," says Justice Story, "between the obligation of a contract and a remedy upon it, yet if there are certain remedies existing at the time when it is made, all of which are afterwards wholly extinguished by new laws, so that there remain no means of enforcing its obligation, and no redress, such an abolition of all remedies, operating *in presenti*, is also an impairing of the obligation of such contract. But every change and modification of the remedy does not involve such a consequence. No one will doubt that the Legislature may vary the nature and extent of remedies, so always that some substantive remedy be in fact left. Nor can it be doubted that the Legislature may prescribe the times and modes in which remedies may be pursued, and bar suits not brought within such periods and not pursued in such modes. Statutes of limitation are of this nature, and have never been supposed to destroy the obligation of contracts, but to prescribe the times within which that obligation may be enforced by a suit, and in default to deem it either satisfied or abandoned. The obligation to perform a contract is coeval with the undertaking to perform it. It originates with the contract itself, and operates anterior to the time of performance. The remedy acts upon the broken contract, and enforces a pre-existing obligation." Story on the Constitution, 236, section 1385.

The law requiring the registration of tacit mortgages within the time limited, is but a modification of the remedy, and does not impair the obligations of contracts. The State had the right to require all existing mortgages and privileges to be recorded, and to fix the period in which the registry shall be made. In doing this the law in no manner assails the inviolability of contracts protected by the Constitution of the United States.

In *Jackson v. Lamphire*, 3 Pet. 290, the Supreme Court of the United



States said: "It is within the undoubted power of State Legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger if the prior deed is not recorded within the limited time; and the power is the same whether the deed is dated before or after the recording act. Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligations of contracts. Such too is the power to pass acts of limitation, and their effect. Reason and sound policy have led to the general adoption of laws of both descriptions, and their validity can not be questioned."

It is therefore ordered that the judgment appealed from be amended by striking out that part allowing Mrs. Eliza J. Nelson the rank of a mortgage creditor. As thus amended, let it be affirmed, allowing her claim as an ordinary debt on the tableau. It is further ordered that appellee pay costs of appeal.

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NO. 3625.—CORPORATION OF AMITE CITY *v.* DESIRE CLEMENTZ.

A corporation which is invested with the power of assessing taxes and licenses, has the right to enforce their payment by judicial proceedings.

**A**PPEAL from the Parish Court of the parish of Tangipahoa. *Bradley*, Parish Judge. *William Duncan*, for plaintiff and appellant. *T. & J. Ellis*, for defendant and appellee.

**TALIAFERRO, J.** This suit was instituted against the defendant to compel him to pay fifty dollars, the amount required as a license from each keeper of a coffee house, or retailer of liquors or ardent spirits, within the corporate limits of the town.

An exception was filed on the part of the defendant setting forth that the plaintiff discloses no legal cause of action. That a tax, if legitimate, is not the legal subject of a suit, as it does not originate the relation of creditor and debtor, and can not pass into a judgment. Lastly, that the corporation suing is not a legal corporation, it being the creature of the Legislature of the insurgent State government of 1861 and 1862. The defendant had judgment in his favor, and the plaintiff has appealed.

There is no force in the defense. The corporation was vested with the right to impose the tax or license, and consequently has the right to enforce its payment by legal proceedings. The objection to the authority from whence the corporation exists is obviated by articles 148 and 149 of the Constitution of 1868.

It is therefore ordered, adjudged and decreed that the judgment of the parish court be annulled, avoided and reversed. It is further ordered that the plaintiff have judgment against the defendant for the sum of fifty dollars and all costs of suit.

## No. 3526.—P. GREULING v. CITY OF NEW ORLEANS.

Evidence offered and received without objection, showing that an account against the city of New Orleans has been approved by one of the finance committees in accordance with the requirements of the ordinances of the city, must, in the absence of countervailing proof, be taken as establishing the demand.

**A** PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Frank N. Butler*, for plaintiff and appellee. *George S. Lacey*, City Attorney, for defendant and appellant.

HOWELL, J. The plaintiff, as assignee, sues for certain fees alleged to be due the coroner of one of the municipal divisions of the city of New Orleans, as shown by an account approved September 2, 1869, by the Chairman of the Finance Committees of the Common Council and registered by the deputy controller.

The question submitted by the city attorney is, whether or not plaintiff's statement or account is shown to have been verified according to the municipal ordinances and in a way and manner to constitute a recognized indebtedness on the part of the city.

We have not before us the ordinances of the city in relation to this matter, but the testimony of one of the chairmen of the Finance Committees and the deputy controller is in the record without objection, and by them it is asserted that the ordinances on the subject were complied with, and that a document or account approved and registered as this was is equivalent to a certificate of indebtedness by the city. Without countervailing proof this must be accepted as sufficient.

Judgment affirmed.

## No. 2356.—WILLIAM MASSEY v. MICHAEL FINCH.

The statement in an act of sale of real estate that a certain judicial mortgage "still stands against the property," does not create a personal obligation on the purchaser to pay it. In such a case the judicial mortgage creditor must resort to the hypothecary action to enforce payment.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Hornor & Benedict*, for plaintiff and appellee. *George L. Bright*, for defendant and appellant.

TALIAFERRO, J. The defendant being third possessor of mortgaged property, is sought by this action to be held personally bound for the payment of a judgment bearing judicial mortgage upon the property purchased by him, and subject to that mortgage. Judgment was rendered against the defendant, and he has appealed.

The facts of the case are, that in the year 1860 the plaintiff obtained a judgment against Murth Phelan and William Phelan, *in solido*, for \$263 99, with interest and costs, which judgment was recorded in May, 1866. Murth Phelan having died, his son, James Phelan, suc-

*Massey v. Finch.*

ceded as his sole heir, and in October, 1867, he sold to the defendant, Finch, certain real estate in New Orleans, which at the time of the sale was subject to the plaintiff's judicial mortgage, predicated upon the judgment he obtained against the vendor's ancestor in 1860. It appears by the act of sale that Finch paid part of the price in cash, part by releasing a judgment he held against the seller for \$2340, and by giving his notes, secured by mortgage on the property purchased. The recital in the act of sale of the mortgages on the property, concludes by declaring that "the mortgage thirdly described in favor of William Massey against W. and Murth Phelan, still stands against the property, and this sale is made and accepted with said encumbrance."

We do not understand this declaration as importing an obligation on the purchaser to pay, and discharge the debt for which the mortgage subsists. He has not assumed to pay it as part of the price, nor in any other manner. The plaintiff has the hypothecary right to require him to pay the debt or surrender the property, but he has not by the contract the right to compel him by a personal action to discharge the debt.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that there be judgment in favor of the defendant, the plaintiff paying costs in both courts.

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No. 3623.—STATE OF LOUISIANA v. WARREN DENKINS.

In a criminal trial on the charge of shooting at another, who was in pursuit of the accused, evidence showing that the person shot at was the sheriff of the parish at the time, is admissible to show that such person was in the peace of the State at the time of the shooting.

**A**PPEAL from the Eighteenth Judicial District Court, parish of Webster. *Watkins, J. Thomas E. Paxton*, District Attorney, for the State. *G. W. Tompkins* and *A. B. George*, for defendant and appellant.

**TALIAFERRO, J.** The defendant having been indicted under the provisions of the seven hundred and ninety-second section of the Revised Statutes for an assault upon one G. W. Warren, by shooting at him, was found guilty, and from the sentence of the court thereon, of eight months' imprisonment in the penitentiary, has taken this appeal.

The grounds on which the defendant asks a reversal of the judgment, and that the case be remanded for a new trial, are set out in a bill of exceptions to the ruling of the court in regard to the admission of evidence to show that Warren, at the time of the commission of the offense, was sheriff of the parish of Webster, and acting officially in the discharge of his duties in that capacity.

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46	1442

24	29
121	576

From the statement of facts appearing in the record, it appears that the defendant shot at Warren while the latter, with a company of men, was in pursuit of and in the act of arresting him for the supposed commission of an act of felony; that a hue and cry had been raised, and that the sheriff and others were in pursuit of the defendant, endeavoring to make his escape, and that no warrant had been issued for his arrest.

The points made by the defendant are, that as he was not indicted for shooting at an officer, a different offense from the one charged, evidence was not admissible to show that G. W. Warren was a public officer; and that the officer having no warrant or authority, and no felony having been committed, there was nothing to justify pursuit by hue and cry, endangering the life of the defendant.

The court admitted the evidence for the purpose of enabling the prosecution to show that at the time the offense charged was committed, Warren was "in the peace of the State, and in the discharge of his duties as a public officer." Archbold, vol. 1, p. 91; 6 An. 286, *State v. Stouderman*. We think this ruling correct.

It is therefore ordered that the judgment of the district court be affirmed, with costs.

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No. 3562.—*THOMAS D. MILLER v. MARMICHE and Wife.*

A power of attorney which gives the agent the authority "to cite and appear," must be construed as conferring upon the agent the power to prosecute and defend suits which may be brought by or against his principal. A sale of property under a judicial proceeding carried on contradictorily with the agent who holds such a power of attorney is not therefore void for want of authority in the agent to represent his principal in the litigation.

**A**PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Th. Marsoudet*, for plaintiff and appellee. *Saucier & Michinard*, for defendants and appellants.

**TALIAFERRO, J.** The controversy here presented grows out of an effort on the part of the plaintiff to compel one Dechamps, a purchaser of certain property belonging to defendants, and which was mortgaged to plaintiff and sold under an order of seizure and sale, to pay the price of adjudication.

The property was adjudicated to Dechamps, who paid \$2566 67 in cash, being one-third of the sum bid, but he refused to comply with the other terms of sale by executing his notes for the payment of the remainder, alleging in his answer to the rule taken against him that the proceedings under which the order of seizure and sale issued are null and void, and the sale conferred no valid title to him of the property; that the nullity arises from the fact that the defendants against whom this order of seizure and sale was obtained are absentees,

and that the proceedings were not carried on contradictorily with them; that no person legally authorized to represent the defendants in the defense of the suit against them appeared on their behalf. The rule was made absolute, and the defendants in rule ordered to comply fully with the terms of sale. From this judgment the defendants appealed, and pray that the judgment of the lower court be reversed and the sheriff ordered to restore the sum paid him as the cash part of the price bid for the property.

The only question presented is, had Ducros, the attorney in fact of the defendants, then absentees, authority to represent them in suits brought against them? This we think must be answered affirmatively. Various powers are conferred by the mandate, both general and special. He is authorized "*Citer à comparaitre devant tous juges et tribunaux compétents, traier, transiger, compromettre, se concilier, obtenir tous jugements,*" etc. The authority to cite and to appear seem sufficiently to indicate the purpose of the principal to confer upon his agent the power both to prosecute suits against his debtors and to defend suits that might be brought against himself. The terms used in clothing the mandatary with authority are comprehensive and explicit. The expression *comparaitre*, in this connection, forcibly conveys the idea of appearing in courts for the purpose of defending suits. The case of *Fincher v. Robin*, 4 An. 61, is not in point.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

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No. 1724.—J. & H. AUCHINCLOSS v. THEO. FROIS & Co.

By the act of Congress of June 11, 1864, the prescription of actions was suspended between citizens of the adhering States and those of the so-called Confederate States. A claim held by a resident of the State of New York, an adhering State, against a citizen of Louisiana, a seceding State, was not therefore affected by the prescription enacted by the latter State during the time of such suspension. But in computing the time in which such obligations or claims are prescribed, the time during which the war continued must be deducted from the estimate, and the remainder must alone be counted.

**A** PPEAL from the Third District Court, parish of Orleans. *Emerson, J. J. N. Brickell* and *R. & H. Marr*, for plaintiffs and appellees. *J. L. Tissot*, for defendants and appellants.

HOWELL, J. This suit was instituted in December, 1866, by plaintiffs, the holders, who resided during the war and since in the city of New York, on four promissory notes made in said city, in March, 1860, payable respectively in eight and nine months by the defendants, residents of New Orleans, who pleaded the prescription of five years. To this plea the plaintiffs successfully oppose the act of Congress of June 11, 1864, in relation to the limitation of actions in certain cases (13 Statutes at Large 123), and the decision in the case of *Stewart v.*

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J. & H. Auchincloss v. Frois & Co.

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Kahn, 11 Wallace 493, carried up from this court, as suspending the prescription in this class of cases.

We take this occasion to remark that in the case of *Stewart v. Kahn*, the above act of Congress was not invoked in this court until application was made for a rehearing, and by our jurisprudence points not raised on the trial will not be considered on application for a rehearing. It follows, therefore, that the United States Supreme Court overruled a decision of this court on a point which had never been presented to us in a manner that we could pass on it.

Judgment affirmed.

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No. 2431.—GEORGE ULLMEYER v. EHRLMANN & LECANU and JACOB ZOLLY.

A rule taken against a garnishee to show cause why an interrogatory shall not be taken for confessed, will be dismissed if the answer of the garnishee to the interrogatory shows that he has answered the questions asked categorically.

**A**PPPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. James D. Augustine*, for plaintiff and appellant. *Julian Michel*, for defendants and appellees.

TALLAFERRO, J. The plaintiff having obtained judgment against the defendants, *in solido*, for the sum of \$4450, with interest, issued execution thereon and took out garnishment process against J. H. Ehrmann, testamentary executor of the succession of Durand, and propounded several interrogatories to him as to whether he had in his hands or under his control, in his capacity of executor, any money, rights, credits or other property belonging or due to the defendants in execution. The third in number of these interrogatories is as follows: "Are you not testamentary executor of the succession of Durand or of any other succession, and in such succession have you not filed a tableau of distribution in which the said defendants, the late firm of Ehrmann & Lecanu, are put down as privileged creditors for about \$1000 and ordinary creditors for about \$5000? If yea, where is such succession opened, you being required to make a full disclosure in relation to the same?"

The answer to this interrogatory declares that the garnishee, as executor of Durand, had filed in the probate court of the parish of Natchitoches a tableau of distribution of the estate, which he declared to be insolvent; that he had placed the firm of Ehrmann & Lecanu on the tableau as privileged creditors for \$1369 43, and as ordinary creditors for \$5286 36; that the tableau was filed nineteenth of February, 1869, and that on the twenty-third of the same month all the right, title and interest of the firm of Ehrmann & Lecanu in the amounts so placed on the tableau were transferred to Messrs. Lapene & Ferre, a

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Ullmeyer v. Ehrmann & Lecanu and Zolly.

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commercial firm of New Orleans, in part payment of the judgment obtained in the city by *Lapene & Ferre v. Ehrmann & Lecanu*, in the Sixth District Court, for \$2800, interest and costs.

The plaintiff in execution thereupon took a rule upon the garnishee to show cause why, in default of answering the third interrogatory fully and categorically, the same should not be taken for confessed, and judgment rendered against him accordingly. On trial of the rule it was dismissed, and from the judgment of dismissal the plaintiff has appealed.

We think the judgment of the lower court correct. We do not see that the garnishee has not answered the interrogatory categorically. The plaintiff alleges that the answer is not clear and full, and especially in this, that it does not disclose the manner in which the alleged transfer was made and by whom. Such disclosure, we apprehend, is not required by the terms and scope of the interrogatory.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

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No. 3520.—SUCCESSION OF JOHN McDONOGH.—On application of MOSES FOX for probate of codicil.

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Isolated expressions used by a court in giving reasons for its judgment can not control the force and effect of a formal decree. A decree which pronounces a document claimed to be a codicil to a last will and testament a forgery, can not therefore be controlled, limited or qualified by expressions used by the court in giving its reasons for the judgment.

The plea of *res judicata* will be maintained where the suit is between the same parties and is founded on the same cause of action.

**A**PPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. R. King Cutler and E. K. Washington*, for appellant. *Semmes & Mott and George S. Lacey*, for the cities of New Orleans and Baltimore, appellees.

**TALIAFERRO, J.** The appellant alleges that John McDonogh died in New Orleans in the year 1850, leaving a large fortune, which he disposed of by act of last will, constituting the cities of New Orleans and Baltimore legatees by universal title for a large part of his estate; that subsequent to the date of the testament by which these large bequests were made, McDonogh, by a codicil to his last will and testament, willed and bequeathed to the appellant the sum of three hundred thousand dollars, which he directed the trustees of his estate to pay to this legatee eight years after the decease of the testator; that in the year 1860 he instituted suit against the cities of New Orleans and Baltimore for the purpose of having the codicil or will under which he claims probated and executed, and to recover judgment for and payment of the sum aforesaid; that by decree of this court it was determined that the last act of will or codicil was not sufficiently

proved and established, and the decision was against him by a bare majority of the court. The appellant avers that the application now made to have the codicil probated and its provisions executed, is a revival of his former action, and forms a supplemental or additional petition to the one heretofore filed on the twenty-sixth of September, 1860. In the present action the applicant made the cities of Baltimore and New Orleans, by their proper representatives, parties, and prays that the codicil to the last will and testament of McDonogh be admitted to probate and an order rendered for its execution; that he be recognized as the nephew of John McDonogh and the person named in the codicil, and that he have judgment *in solido* against the cities of New Orleans and Baltimore for the sum mentioned, with interest, etc. The applicant for probate and execution of the codicil was met by each of the defendants with the exception of *res judicata*. That plea was sustained by the court *a qua*, and the suit dismissed. From this judgment the plaintiff has appealed.

The final decree of this court in the former case, and pleaded as *res judicata* in the present one, is found in 18 An. 419 *et sequentes*. It is contended on the part of the appellant that by the decision in that case the court did not pass upon the question of forgery which was directly charged by the defendants, and that it merely rejected the plaintiff's demand on the ground that he had not established the genuineness of the codicil with legal certainty, and that the decree should rather be regarded as of the nature of a nonsuit, and not as definitively settling the controversy.

We are unable to see the correctness of this view of the decision first rendered on the appellant's claim. A careful perusal of that decision leaves upon our minds a different impression. It seems to admit of no doubt, from the terms used by the court in announcing its conclusions from a review of the evidence, that it believed the codicil is a forgery, although it does not pronounce it to be such *co nomine*. But it is well settled that isolated expressions, if there were such, intimating doubt in regard to the issue, can not control the decretal force of a formal judgment. The reasoning of the court *arguendo* is less to be regarded than the final conclusion announced. 14 La. 445; 19 La. 318; 10 An. 352.

We think all the conditions required to constitute *res judicata* meet in the present case. A judgment has been rendered between the same parties, acting in the same capacity, and the cause of action was the same. It was *inter easdem personas et eandem conditionem personarum*. That judgment was definitive against the plaintiff. The exception, we think, was properly sustained by the lower court, and the judgment is therefore affirmed.

Rehearing refused.



## No. 3347.—JAMES BREWER v. E. J. GAY et al.

94	35
49	877
24	86
106	530

He who alleges simulation must prove it.

Under an allegation of simulation merely, of a mortgage, evidence that it is fraudulent, but real, will not be admitted if objected to.

A. D. Kelly granted a mortgage in favor of Dr. J. C. Patrick, or any future holder of certain notes which he had given, on real estate in the city of New Orleans to secure their payment. The mortgaged property was afterward sold under judicial process by other and subsequent mortgage creditors. This suit was then brought by the other and subsequent mortgage creditors to cancel the mortgage given in favor of Patrick or any future holder or holders of the notes, and to have the proceeds applied to the payment of their mortgages by preference, on the ground that the mortgage given in favor of Patrick was simulated and fictitious. Held—That the mortgage creditors having alleged merely that the mortgage in favor of Patrick was simulated, and having failed to establish the simulation by proof, they could not be permitted to show that it was fraudulent, set it aside on that ground, and claim the proceeds of the sale for the benefit of the junior mortgages.

**A**PPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Miles Taylor, J. S. Whitaker and J. Caldwell Pierce*, for plaintiff. *Race, Foster & E. T. Merrick*, for E. J. Gay, defendant, and *Lea, Finney & Miller*, for the other defendants.

HOWE, J. On the fourth of November, 1865, A. D. Kelly, of New Orleans, by public act granted in favor of Dr. J. C. Patrick, of West Baton Rouge, or any future holder or holders of certain notes therein described, a mortgage on certain real estate in the city of New Orleans. The notes were forty-eight in number, and their aggregate amount \$39,600. The object of the mortgage as recited in the act was to secure to Patrick a debt due him by Kelly for that sum.

The mortgage was recorded November 6, 1865, and about the same time the notes were delivered as follows: to the amount of about \$30,000 to T. L. Bayne, Esq., for purposes to be hereinafter mentioned, and to the amount of about \$59,000 to the defendants, A. H. Wallace, J. H. Wallace, A. H. & T. H. Wallace, D. H. Gordon, and Kelly, Tackett & Ford, respectively, as collateral security for debts due them by A. D. Kelly & Co.

Of the notes delivered to Mr. Bayne, one was in February, 1867, transferred to the defendant, the Canal Bank; and six in November, 1866, to the firm of William Edwards & Co., and are now held by the defendant, E. J. Gay, a member of that firm.

The plaintiff obtained judgment against A. D. Kelly & Co. May 10, 1866, and caused it to be recorded June 7, 1866. As a judicial mortgagee, he commenced this action December 31, 1869, praying to be decreed a preference over the defendants above mentioned (the property having in the meantime been sold under judicial process) on the grounds that this mortgage, of November 4, 1865, was a mere simulation, that it was made to cover and shield the property of A. D. Kelly from the pursuit of his creditors, that the defendants acquired possession of the notes held by them after plaintiff's judicial mortgage had arisen, and that therefore their mortgage claim was "null and void" as to him.

There was judgment in favor of plaintiff as to all the defendants except the Canal Bank and E. J. Gay. The mortgage of the bank was recognized for \$3000 and interest, and that of E. J. Gay for \$4960 and interest. All parties have either appealed or by answer as appellees asked for an amendment of the judgment.

An examination of the very voluminous record in this case will be simplified by attending to the exact issue raised by the pleadings. The demand of the plaintiff is founded upon the allegation that the mortgage to Patrick of November 4, 1865, was a simulation, a vain shadow cast by Kelly on his property for his own purposes merely, to shroud it from the pursuit of his creditors. There is not an allegation that the mortgage was real but fraudulent; that having an actual existence it was liable to be annulled as giving an unlawful preference to creditors. We may therefore properly dismiss from consideration all the testimony in reference to illegal preference, the defendants having duly objected to its reception for such purpose; and the main question in the case which is left is, not whether the mortgage existed for a fraudulent purpose, but whether it had any existence at all.

The plaintiff who alleges simulation must prove it. So far from proving it in this case, the record shows that the mortgage attacked had a real existence, though the debt secured was not precisely what it was described to be in the public act. The object of the parties seems to have been to create a series of notes secured by mortgage, and to use these notes for two purposes, *first*, to secure Dr. Patrick, who had loaned to A. D. Kelly & Co. his notes for large sums, which notes A. D. Kelly & Co. had pledged at the banks as collateral, and on which Patrick was primarily liable as maker, and *second*, to secure a number of creditors of A. D. Kelly & Co. in respect to their matured claims, whose validity is not disputed.

The portion of the notes designed to secure Patrick were delivered to Mr. Bayne, to be held by him in accordance with this plan. He delivered one of \$3333 33 to the defendant, the Canal Bank, for the purpose of taking up a note of \$4000 made by Patrick, and these pledged by Kelly & Co. He delivered six, amounting to \$7666 66, to William Edwards & Co., as collateral to a loan of \$4960 in cash, used also to take up a note held by the Bank of Louisiana, which had been made by Patrick and pledged by Kelly & Co. These notes are held by E. J. Gay, one of the defendants, a partner of Edwards & Co.

It seems clear (the question of illegal preference being eliminated) that the moment the notes were delivered to Bayne the mortgage had a legal existence, the *vinculum juris* was complete. This occurred about November 6, 1865. The notes were negotiable, were indorsed in blank, and the mortgage was made in favor of any future holder. The notes did not perish in the hands of Bayne, nor did the mortgage.

He delivered the notes to the Canal Bank and Gay (Edwards & Co.) for a valuable consideration, and we see no reason why they should not enforce them and enforce their accessory mortgage. 21 An. 3; 22 An. 285.

Nor do we see why they should not enforce them in full. Kelly does not object, nor Patrick's estate, nor Bayne as agent, and neither is made a party to this suit. There are no equities between maker and payees. To say that these holders of collaterals should not be permitted to collect more than they have advanced or agreed to take would be to deal too summarily with the rights of parties not before the court.

The rights of the other defendants, the Wallaces, Gordon, and Kelly, Tackett and Ford seem equally clear. As to them Dr. Patrick was a nominal mortgagee, but the mortgage was none the less valid under the facts above recited as to the plaintiff. The notes were transferable by mere delivery, and the mortgage was made not only in favor of Patrick, but of any future holder or holders of these notes. Within a day or two, certainly within the month of November, 1865, the notes to the extent of about \$51,000 were delivered to the defendants, the Wallaces and others, lastly above named, as collateral security for valid existing debts. The *vinculum juris* was complete, and we do not think that the plaintiff, acquiring his rights as judicial mortgagee seven months later, can legally complain. *Swift v. Tyson*, 16 Peters 20; *Succession of Dolhonde*, 21 An. 3; *D'Meza v. Generes*, 22 An. 285.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of defendants with costs in both courts.

NO. 2391.—CITY OF NEW ORLEANS v. W. S. MOUNT, Treasurer, and MICHINARD, Assistant City Attorney.

Certificates of indebtedness or police warrants issued by the Board of Metropolitan Police are not bills of credit within the meaning of section ten of article one of the Constitution of the United States. The statute of twenty-seventh of February, 1869, making such warrants receivable for taxes due the city does not violate this provision of the Constitution, and is not, therefore, void on that account.

**A**PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. J. R. Beckwith*, City Attorney, and *O. Roselius*, for plaintiff and appellant. *E. Filleul*, for defendant and appellee.

**TALIAFERRO, J.** The Mayor of New Orleans took out injunctions against the City Treasurer and the Assistant City Attorney to restrain them from receiving in payment of city dues (licenses and taxes due the city) Metropolitan Police warrants as provided by an act of the Legislature approved twenty-seventh February, 1869, on the ground

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City of New Orleans v. Mount, Treasurer, and Michnard, Assistant City Attorney.

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of the unconstitutionality of the act, it being, as alleged, in violation of section ten of article one of the Constitution of the United States, which declares that "no State shall emit bills of credit nor make anything but gold and silver a tender in payment of debts."

Newman, a broker, intervened, contesting the validity of the injunctions and claiming the right to pay his license in Metropolitan Police warrants, a right, he alleged, had been denied him.

There was judgment for defendants and intervenor, dissolving the injunctions, and the plaintiff appealed.

Instruments of the kind here objected to as bills of credit, were certificates of indebtedness issued by the corporation to facilitate their business operations, which have often been decided not to be bills of credit within the meaning and intentment of section ten of article one of the Constitution of the United States. Story on the Constitution, No. 1364; *Smith v. The City of New Orleans*, 23 An. 5. We think the judgment of the lower court correct.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

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No. 3486.—STATE v. CHARLES EARLE and JOHN GARVEY.

In all criminal prosecutions in which the punishment at hard labor is twelve months or more, the accused is entitled to twelve peremptory challenges to the jurors chosen to try the cause, and in like manner the State is entitled to six peremptory challenges in each prosecution. Revised Statutes of 1870, section 998.

In case, therefore, that more than one accused has been put on trial for the same offense in the same indictment, the State will not thereby gain the right of peremptorily challenging more than six jurors, who have been chosen to try the cause.

**A** PPEAL from the First District Court, parish of Orleans. *Abell, J. S. Belden*, Attorney General, for the State. *A. A. Atocha*, for defendants and appellants.

HOWE, J. The defendants having been found guilty of murder and sentenced accordingly, have appealed to this court. They make five points here, of which, however, it will be necessary to examine but one.

It appears from an inspection of the first bill of exceptions taken during the trial, that the State was allowed to challenge peremptorily more than six jurors, the court below deciding that each prisoner was entitled to twelve peremptory challenges and "the State to six for each accused."

It is true that each defendant was entitled to twelve peremptory challenges, but it by no means follows that the State is entitled to six for each defendant. The State has no rights in the matter beyond those conferred by the statute, and the statute declares that "in all criminal prosecutions wherein the defendant is allowed peremptory

challenges, the State shall also be allowed to challenge without cause any number not exceeding six." R. S. 1870, sec. 998. This means, clearly, six in a single prosecution—in the trial of a single indictment—without any reference to the number of defendants included in the prosecution, or mentioned in the indictment. The language is plain, the case at bar is within its provisions, and we are, therefore, constrained to think the court erred in allowing the number of peremptory challenges by the State to exceed six.

The precise question in this case was decided by the Supreme Court of Ohio in the year 1840 in the same way, under a statute which we think practically identical in this respect with our own. In the law of Ohio the phrase "trial of an indictment" was used instead of "criminal prosecution," and the right to challenge, peremptorily, *two* of the pannel was given to "every prosecuting attorney" and "every defendant." The lower court, in a case where there were three defendants, having allowed the State *six* peremptory challenges, the Supreme Court, in reversing the judgment, said:

"There was but one indictment, and on the part of the State the right of peremptory challenge should have been confined to two, while each of the defendants could, in like manner, legally object to the same number. Had the defendants been separately tried, the indictment would have been separate as to each, and on every trial the State's right to such challenge of two of the jurors would have been legal, but upon a joint trial it is otherwise."

We are constrained to order a new trial.

It is therefore ordered that the judgment appealed from be reversed, and that the cause be remanded for a new trial.

#### No. 2419.—EUGENE CENAS v. RICHARD SHACKLEFORD.

The maxim *de minimus non curat lex* will not be applied to a case where judgment has been given for one year's interest more than is due on the demand, but in such a case the judgment of the court *a qua* will be amended so as to allow interest only from the time it was due.

**A**PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. C. M. Conrad & Son*, for plaintiff and appellee. *R. Shackelford*, in person, appellant.

WYLY, J. The defendant having appealed from the judgment herein against him on a promissory note, contends it is erroneous because it allows interest from the nineteenth day of March, 1859, although the indorsement on the note and the evidence shows that the interest for the year ending nineteenth March, 1860, has been paid.

The plaintiff contends that this is merely a clerical error of the judge in drawing up the decree, and as the defendant did not seek to

have it remedied by application for new trial, it should not be noticed in revising the judgment; and, also, under the authority of *McMullen v. Jewel*, 3 An. 139, this error should not save him from damages for frivolous appeal.

In the case cited there was error in condemning the defendant to pay the costs of an illegal citation, but the court regarded this as a trifling error and applied the rule *de minimus non curat lex*. But here the plaintiff had judgment in accordance with the prayer of his petition and he recovered of the defendant one year's interest on the debt more than was due him. This was not a clerical error of the judge, and it is not a trifling error to which the rule referred to should be applied.

It is therefore ordered that the judgment herein be amended so as to allow interest only from the nineteenth day of March, 1860, and as thus amended let it be affirmed. It is further ordered that appellee pay cost of appeal.

No. 3379.—JAMES H. YOUNG v. THE MAGAZINE STREET RAILROAD COMPANY, and THE MAGAZINE STREET RAILROAD COMPANY v. JAMES H. YOUNG. (Consolidated.)

In a sequestration suit where the preservation of the property sequestered is provided for by the defendant giving a bond, the appointment of a judicial sequestrator is illegal, and the order appointing a sequestrator in such a case, with the order homologating his account, will be annulled and set aside on appeal.

**A** PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. R. King Cutler and F. N. Butler*, for plaintiff and appellee. *Cotton & Levy and Semmes & Mott*, for defendant and appellant.

**TALIAFERRO, J.** In the progress of the trial of these cases in the court below the judge *a quo* appointed a judicial sequestrator and placed in his possession and under his administration the property in controversy, viz: the railroad and all its appliances and appurtenances by an order rendered on the nineteenth of July, 1870. The sequestrator, it seems, took charge of the road on the sixteenth of October following and on the thirteenth of February, 1871, the court rendered an order that the sequestrator file an account, which was accordingly done. This account was opposed by the railroad company as to attorney's fees, \$500, and services of the sequestrator, \$3500. An order was rendered homologating the account, reducing the charge of the sequestrator to \$200 per month. From the order appointing the sequestrator and that homologating his account the railroad company have appealed.

The points presented are:

That the Magazine Street Railroad Company having obtained a release of the injunction sued out by Young, by entering into the re-

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Young v. Magazine Street Railroad Co., and Magazine Street Railroad Co. v. Young.

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quired bond on the fourth of April, 1870, the judge was without power to order a sequestration; that the item of account, \$3500, for services of Hillman, the sequestrator, is excessive and should not be allowed; that the sequestrator, if entitled at all to claim compensation for his services in that capacity, can only claim it from the party cast in the suit.

The railroad company having entered into bond in favor of their adversary to secure him against loss or damage that might result from their retaining possession of the road pending the suit, and not perceiving that anything subsequently occurred to weaken that security, we do not think a state of things existed that authorized the judge ex-officio to appoint a judicial sequestrator. The preservation and safe keeping of the property in controversy being provided for, the appointment of a keeper was unnecessary and productive of unnecessary costs.

It is therefore ordered, adjudged and decreed that the order appointing Hillman judicial sequestrator and that homologating his account be annulled, avoided and reversed. It is further ordered that the appellee pay costs of these proceedings.

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#### No. 2518.—JOHN M. PRATHER v. THE CITY OF NEW ORLEANS.

The municipal government set up by the military authority of the United States for the city of New Orleans, which continued from 1862 to 1866, and administered the affairs of the city by officers appointed by the military authority, was not the government of a conqueror. The doctrine in relation to contracts made by an occupying conqueror in reference to property of the conquered, from which he is afterward expelled, or which he is required by treaty to give up, has no application to contracts made by such municipal officers.

A contract made by the city, under the authority of an ordinance of the Common Council, whereby the steam ferry privileges were sold to a third person for a given period of time, was therefore binding and obligatory upon the city, even though the officers in possession of the city government at the time the contract was made, were superseded by officers appointed or elected by the city herself before the term of the contract had expired.

In this case it was held, that inasmuch as the city government that succeeded the one by which the steam ferry privileges had been given, had repealed the ordinances of the former Council which authorized the contract, and had taken the contracts for the steam ferry privileges away from the contractor and given them to another person, the first contractor was entitled to recover from the city the damages which the violation of his contract had caused him.

**A** PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Billings & Hughes*, for plaintiff and appellant. *George S. Lacey*, for defendant and appellee.

**Howe, J.** This is a suit for damages. On the sixteenth January, 1866, by ordinance No. 6412, the government of the city of New Orleans, as then constituted, directed the Mayor to advertise for sealed proposals for the sale of the steam ferry privileges from foot of Canal street and foot of Esplanade street, for a term of ten years from June 1, 1866.

On the fifth of February, 1866, by ordinance 6425, the Mayor was authorized to enter into contracts with the plaintiff (presumably the highest bidder), in accordance with the specifications of the advertisement.

On the nineteenth February, 1866, the contracts were duly passed before the city notary, and on the twenty-first February, 1866, were each indorsed as follows by the military commander of the Department of Louisiana:

"Contracts of this character should not have been made by the city government in its present anomalous and inchoate condition; but as this contract does not trench upon any portion of the wharf or levee space reserved for the use of the general government, *it is approved*, subject to the condition that this approval shall not prejudice any right of the United States to any levee batture, or prejudice or determine any private right or interest."

Shortly after a new set of municipal officers were elected, John T. Monroe being Mayor; and on the twenty-fifth May, 1866, by ordinance 60, N. S., the Controller was authorized to sell for a term of ten years the same rights which had been conferred on plaintiff.

On the twenty-ninth May, 1866, the ordinance 6425, under which the contracts with plaintiff had been made, was repealed.

On the first June, 1866, the plaintiff made a written demand on the Mayor to be put in possession, or, in the language of his letter, "have my bonds and contracts returned to me."

In December, 1866, the ferries in question were let to other parties. In May, 1867, this suit was begun. The court below gave judgment for defendant, and the plaintiff appealed.

*First*—It is contended by the defendant that the city government established in New Orleans during the war, and commonly known as the bureau system, had "no legislative powers," such powers being expressly withheld from it by the military orders creating it. If by "legislative powers" is meant the power to make laws, we might agree with the defendant's view; but if it is contended that this bureau government could not pass such ordinances as those above quoted, Nos. 6412 and 6425, we can not assent to the proposition. The ordinances in question were merely mandates from the authorities charged with the administration of the ferries to the Mayor to administer them in a certain way.

It is matter of history that for nearly four years the government established by military authority passed ordinances of this character, and that this was done with the permission, at least, of the military power.

Moreover, the contracts in this case, and necessarily the action preliminary thereto, were specially approved, as we have seen, by the military commander.



*Second*—But it is claimed that on the ninth February, 1866, the same military commander prohibited the municipal authorities from making such contracts as those before us, and that his special approval of these particular contracts on the twenty-first February, 1866, was so limited and conditional as not to cure the want of power produced by his general prohibition. We can not assent to this construction. He approved of the contracts. So far as his approval was necessary to render legal the action of the municipal authorities, it was given. Their power to make the contract was completed, and their liability to observe its obligations was also complete. The condition attached was evidently meant to prevent possible infringement, not on the rights of parties to the contract, but of outside parties.

*Third*—It is further contended by the defendant that the laws in force at the time these contracts were entered into, required "all contracts to be made or let by authority of the City Council, and all materials and supplies to be furnished to be offered by the Mayor at public auction, after the usual advertisements, and adjudicated to the lowest bidder." We apprehend this point was made through inadvertence. The city in this case had something to sell, not to hire or buy, and she was surely not required to sell to the lowest bidder. The statute quoted, act of 1850, page 164, § 22, refers to work to be done for or supplies to be furnished to the city, and the authorities cited, 12 An. 154, 496, and 15 An. 667, have the same reference.

*Fourth*—It is contended by defendant that the plaintiff voluntarily abandoned his contracts with the city by his letter of June 1, 1866, above quoted. We can not concur in this view. The letter was superfluous and inartificial. The city had already actively violated its obligations by repealing the ordinance 6425 and re-offering the privilege for sale. The right of action was complete, and the letter contains no voluntary remission thereof. On the contrary, we understand it to express a desire on the part of the plaintiff either to proceed with his contract or to formally repudiate its further obligation, and possibly to sue for damages. At all events, we can not easily presume from his language that he intended to donate his damages.

*Fifth*—It is finally contended by the defendant, and this was the basis of the judgment in its favor in the court below, that the contracts in question, "even if lawful and binding upon the contracting parties" at the time they were entered into, ceased with the existence of the particular form of municipal government under which they are made, and in support of this proposition we are referred to the familiar principle that any contracts or agreements which the conqueror may make with individuals farming out the property of the conquered, will continue only so long as he retains control of such property, and will cease on its restoration to or recovery by its former owner.

The effect of such a view would be a little singular in this case. The contracts made on the nineteenth February, 1866, by which the plaintiff was to be put in possession of the ferry privileges on the first of June, 1866, are admitted to be "lawful and binding;" yet by the change of city government in the intervening month of April or May, they are made unlawful and of no binding effect.

But we can not recognize the application to this case of the principle of international law quoted by defendant. The municipal government established by military authority, and continuing without interruption from 1862 to 1866, was one of the series of municipal governments which have in times past administered the affairs of the corporation. It was, during nearly four years, in quiet possession, without the shadow of an adverse claimant. Its officers were recognized as the municipal officers by every department of government, State and national. The doctrine in relation to contracts made by an occupying conqueror in reference to property of the conquered, from which he is afterwards expelled, or which he is required by treaty to give up, has no application to the contracts made by such municipal officers. They were not occupying conquerors. The city of New Orleans, their principal, was not an occupying conqueror. They were not contracting in regard to the property of some third and conquered person. They contracted in regard to the property of the city, which was then in possession of the city as owner, and is still in its possession. As to the city, there has never been any change of possession or control as owner. She was owner in January, 1866, and she was owner when this suit was brought. She has changed her officers, but how can such change effect "lawful and binding" contracts made by their predecessors?

But if it be granted that these municipal authorities in some way represented and acted for the United States as occupying conqueror, the conclusion desired by defendant does not follow.

In the case of *Leitensdorfer v. Webb*, 20 Howard, 176, where the question was of the validity of a provisional government established in New Mexico in 1846 by a military commander, and especially of the continuing effect of its laws and judicial system, a similar point was made, but the court replied: "The fallacy of this pretension is exposed by the fact that the territory never was relinquished by the conqueror, but was retained by the occupant until possession was matured into permanent dominion and sovereignty, and this, too, under the settled purpose of the United States never to relinquish the possession acquired by arms."

Applying this undoubted principle to the case at bar, and admitting for the moment that the contracts in question were made on behalf of an occupying conqueror, we should only find that the occupation still

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Prather v. The City of New Orleans.

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continued, not by military force, it is true, but by civil dominion and sovereignty. The Confederacy did not retake New Orleans, and to-day New Orleans, like Boston, is within the national domain.

We think the plaintiff entitled to recover, and we fix the amount of damages, from the evidence, at \$11,280, with interest from judicial demand.

It is therefore ordered that the judgment appealed from be reversed, and that plaintiff, John M. Prather, have judgment against the defendant, the city of New Orleans, for the sum of \$11,280, with legal interest from May 10, 1867, and costs of both courts.

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No. 1753.—H. R. SHORT v. E. LAPEYREUSE.

A depositary who sells sugar deposited with him and converts the proceeds to his own use is responsible to the owner for its value.

If it be shown, in a suit for the value of the sugar, that the depositary received it, then the burden of showing what became of it falls upon him.

**A** PPEAL from the Third District Court, parish of Orleans. *Emerson, J. Elmore & King*, for plaintiff and appellee. *A. & M. Voorkies*, for defendant and appellant.

WYLY, J. The plaintiff sues for the value of a lot of sugar deposited with the defendant by the agent of the plaintiff, alleging that the same has been sold by the defendant and converted to his own use. To this demand the defendant interposed the exception of domicile.

From the evidence we believe his domicile is in this city. It is shown that his family residence is on St. Philip street; and he has a plantation in the parish of St. Martin, where his family resided before removing to this city. Had we doubts, we would decide he can be sued at either place. *Villere v. Butman*, 23 An. 515, and authorities there cited.

On the merits we think the case is clearly with the plaintiff.

The settlement made with Burket after he had ceased to be the agent of the plaintiff will not exonerate the defendant, because he had been previously notified and called upon to settle with the plaintiff. It was bad faith in the defendant to ship and sell for his own account the sugar of the plaintiff left in his keeping as a depositary. And this occurred after he had been called on for settlement by plaintiff's attorney, who offered to pay the bill for storage. The plaintiff refused to ratify the settlement made by Burket for him without authority, and Burket offered to return to the defendant the amount received in the settlement. The amount of sugar deposited with the defendant being clearly shown the burden of proof is on him to show what has become of it.

On the whole we see no reason to disturb the judgment of the court *a qua* in favor of the plaintiff.

Judgment affirmed.

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## No. 3417.—STATE v. PIERRE BERTIN and JEAN CAPDEVIELLE.

Persons on trial on a charge of burglary have the legal right to confront the witnesses who appear against them face to face. An examination by the jury under an order of the court of the place or house where the crime is alleged to have been committed, away from and out of the presence of the accused, while the trial is going on, is a violation of this right, and the ruling of the judge *a quo* directing the jury to retire to such place and make the examination out of the presence of the accused, will be reversed on appeal, and the cause will be remanded to the court *a qua* for a new trial.

**A**PPEAL from the First District Court, parish of Orleans. *Abell, J. Simeon Belden*, Attorney General, for the State. *James C. Walker*, for defendants and appellants.

**HOWE, J.** The defendants having been convicted of burglary while armed with a dangerous weapon, were duly sentenced and have appealed.

We deem it necessary to examine but one point, which is presented by a bill of exceptions, and that is that certain proceedings were had and testimony taken on the part of the State during the progress of the trial out of the presence of the accused, and in spite of their objection. This point, if tenable, is of the gravest moment. The object of law is the doing of real justice, and nothing can be more painful to the legal mind than the conviction of an innocent man. It is but natural and proper, therefore, that criminal jurisprudence should protect the accused person by numerous safeguards, and among these is the rule that, in general, every proceeding of his trial should take place in his presence. For, peradventure, if he be present he may at any moment, by a question, a suggestion, an argument, or even a glance, confound his accusers, vindicate his innocence, or at least mitigate his punishment. Especially is his presence proper at the taking of testimony against him; and, therefore, in this State, as in many others of the Union, it is wisely provided by the Constitution (article six) that the accused shall have the right of meeting the witnesses against him face to face.

Now, in this case it seems plain that this rule has been transgressed. In the midst of the trial, on motion of the State, the judge *a quo* directed the jury to retire from the courtroom and visit and inspect the premises where the burglary was alleged to have been committed. He directed a witness for the State to accompany them and point out the places marked out on the diagram of the premises which the witnesses had testified to the day before, and which the State had offered in evidence. The accused were not permitted to attend this inspection of the premises, and the explanations of the State witness, his pointing out to the jury the relations between the diagram already in evidence and the premises inspected, took place out of the presence of the accused. Why such proceedings were permitted, we are not

informed, and can not imagine. The judge *a quo* states at the foot of the bill of exceptions that the jury were specially instructed not to converse with the witness, and the witness was instructed "to make no explanations, but to confine himself to pointing out appearances as described in the said diagram."

Concede that in the absence both of the accused and the judge (for the judge did not accompany the expedition), the witness and the jury obeyed these instructions to the letter. It would result merely that the witness gave testimony on the premises, out of court, and in the absence of the accused, in the same way that a dumb person gives testimony, namely, by signs. (Greenleaf, vol. 1, sec. 366, and cases cited.) And it needs no argument to prove that the effect of such "pointing out," in dumb-show, is as potent with a jury as if the verification of the diagram had been enforced with a multitude of words.

It is therefore ordered that the judgment appealed from be reversed and the verdict set aside, and the cause remanded for a new trial according to law.

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#### No. 2440.—SUCCESSION OF ETIENNE CORDEVIOLE.

A married woman may, with the consent of her husband, be appointed dative testamentary executrix.

Article 1664 of the Civil Code, which allows a married woman to accept the testamentary executorship, with the consent of her husband, confers the same power on the judge to appoint a married woman dative testamentary executrix, on her receiving the consent of her husband.

**A** PPEAL from the Second District Court, parish of Orleans. *Duvinneau*, J. *Armand Pitot* and *Charles Louque*, for appellee. *M. A. Dooley*, *C. Roselius* and *Alfred Phillips*, for appellant.

**HOWELL, J.** Two parties, Ferdinand de Luca, as agent and attorney in fact of the "Commune de Lavagna," of Italy, a legatee of the deceased, and John Dawson, who was agent of the deceased prior to his death, have appealed from a judgment appointing Mrs. Commagere, a married woman and the sister and a legatee of the deceased, dative testamentary executrix.

Their main ground of objection is her alleged disqualification as a married woman not separated in property. They contend that article 25 of the Code disqualifies women for any civil functions except those which the law specially declares them capable of exercising, and that articles 1663, 1664, 1678 and 1679 (R. C. C.) do not specially declare a married woman capable of exercising the functions of *dative* testamentary executrix.

It is provided in article 1664 that a married woman may accept the testamentary executorship with the consent of her husband. The

appellee has such consent, and we are unable to perceive the distinction between the power to accept the testamentary executorship and the dative testamentary executorship. If the testator can confer such appointment, the judge is vested by article 1678 R. C. C., article 924, No. 7, C. P., and section 1459 R. S., with the same power, to be exercised on a proper occasion. The dative executor is the substitute when there is no testamentary executor, and in our opinion the various articles of the two Codes construed together clearly authorize the appointment of a married woman, with the consent of her husband, dative testamentary executrix.

We think the judge *a quo* did not err in giving the preference to the appellee.

Judgment affirmed.

Rehearing refused.

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No. 3390.—J. O. NOYES *v.* SIGMUND LOEB.

An action to annul a judgment may be entertained as a general rule, if it be shown that the machinery of the court has been abused. In such a case the court will prefer to excuse an inadvertence rather than to encourage a fraud.

A judgment will be annulled if it be shown that the instrument on which it is based has been paid or satisfied before the institution of suit, and the fact of payment concealed.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Henry B. Kelley*, for plaintiff and appellant. *B. R. Foreman*, for defendant and appellee.

HOWE, J. This case, which is a suit of nullity, was before us last winter upon the peremptory exception of no cause of action, and we had occasion to decide that the petition showed a cause of action and to reverse the judgment of the lower court. 23 An. 13. The cause being remanded for a trial on the merits, judgment was given by the lower court in favor of defendant, and the plaintiff has again appealed.

The judgment sought to be annulled was rendered in the case of *Loeb v. Noyes* upon a promissory note for \$1791 09 during the absence of Noyes and his counsel. That it was rendered in their absence is, of course, in itself, no reason for annulling it. It might under some circumstances be a reason for declining to annul on the ground of laches. But there are cases where the maxim *litigatoris absentia Dei presentia refectur* applies in full force; and a court of justice perceiving that its machinery has been abused will prefer to excuse an inadvertence rather than to encourage a fraud. The case at bar belongs to this class. It would be against good conscience to execute the judgment sought to be annulled.

The plaintiff in the suit of nullity has established enough of the allegations of his petition to satisfy us of this. 23 An. 13.

Among other facts he has shown that the note on which the judg-

ment was rendered had been paid to the extent of \$1000 and the balance remitted by agreement with the then holders; that Sigmund Loeb, plaintiff in the judgment, acquired the note long after maturity; that the note itself had a credit of \$500 indorsed on it and a memorandum at the foot of the credit: "Paid to Sigmund Loeb & Co.;" that these indorsements were erased and no explanation offered of such alteration; and that Sigmund Loeb proceeded to take judgment for the whole amount of the note in the absence of his adversary. If the document on which judgment was thus rendered was not forged, it was at least falsified, and the case is brought within the article 607 of the Revised Code of Practice.

The case is stronger in favor of the appellant than that of *Beauchamp v. McMicken*, 7 N. S. 607, for in that case Beauchamp confessed judgment upon a document purporting to be a copy of a lost draft, and it might have been urged that he had fully admitted the correctness of the copy. Yet it appearing to have been false, the court, Martin, Judge, said: "Truth must be the basis of all judgments, and where one is obtained on false documents made by the party in whose favor it is rendered, the detection of the falsity must entitle the opposite party to relief, even where there is no malice."

It is therefore ordered that the judgment appealed from be reversed. It is further ordered that the judgment in the suit No. 1165 of the docket of the Sixth District Court for the parish of Orleans, in favor of Sigmund Loeb v. James O. Noyes, for the sum of \$1791 09, rendered March 16, 1870, and signed March 23, 1870, be annulled; that the preliminary injunction issued herein on the twenty-sixth April, 1870, commanding Sigmund Loeb and the civil Sheriff of the parish of Orleans to desist from attempting to enforce or execute said judgment be made perpetual; and that Sigmund Loeb pay the costs of both court.

Rehearing refused.

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No. 3359.—*KATE L. HANNEY v. THOMAS L. MAXWELL and another.*

To enable a judgment creditor to maintain a seizure of property held by the wife as her separate estate, under a judgment of separation, on the allegation that the judgment of separation was collusive, and rendered in fraud of the rights of the seizing creditor, the seizing creditor must show affirmatively that he was a creditor at the time the judgment of separation was rendered. C. C. 3434; 6 An. 391; 4 R. 336.

**A**PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. E. K. Washington*, for plaintiff and appellant. *R. & H. Marr*, for defendant and appellee.

**Howe, J.** The plaintiff alleged that she was separate in property from her husband by judgment of a competent court, and entitled to the possession of certain paraphernal property, and especially of certain furniture, which had been decreed by the judgment to belong to

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Kate L. Hanney v. Maxwell and another.

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her separate estate. This judgment was rendered December 29, 1869, and duly published, and decreed the house in which she then resided and the furniture therein (which is the furniture in question) to be her paraphernal property.

She further alleged that the defendant Maxwell had, on the twentieth of June, 1870, seized this furniture under a writ of *fi. fa.* issued on a judgment in favor of H. Hansell v. J. A. Pickett & Co., and she prayed for an injunction. It appears that her husband was one of the firm of J. A. Pickett & Co.

The defendants answered by a general denial and an allegation that the judgment of separation was fraudulent and collusive.

There was judgment in favor of plaintiff, perpetuating the injunction, and the defendants appealed.

The plaintiff established the case set forth in her petition, and the defendants failed to prove the single affirmative point made by them in their answer. They did not prove, nor even allege, that H. Hansell was a creditor at the time the judgment of separation was rendered, and it was therefore logically impossible for them to establish their allegation that it was rendered by collusion to defraud *him*. Rev. C. C. 2434; Morris v. Williams, 6 An. 391; Brassac v. Ducros, 4 Rob. 336. Judgment affirmed.

Rehearing refused.

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#### NO. 2445.—JOSEPH CHRISTEN v. R. RHULMAN.

The law does not authorize judgment to be rendered on a demand that is not due at the institution of the suit. In case suit be brought on several claims, only one of which is due, judgment will only be given on such claim, reserving to the plaintiff any privileges which he may have acquired by attachment on the property of the debtor on claims not yet due.

**A**PPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. L. Castera*, for plaintiff and appellee. *Hornor & Benedict*, for defendant and appellant.

HOWE, J. This suit was instituted on the twenty-second April, 1869, on five promissory notes, one of which was due at the time the suit was begun, and the rest of which were to fall due respectively September 23, 1869, March 23, 1870, September 23, 1870, and March 23, 1871.

There was an attachment issued upon the allegation that the defendant was about to mortgage or assign his property with intent to defraud his creditors, but no question in regard to the regularity or validity of the attachment is before us.

There was judgment rendered in favor of plaintiff on the twenty-fifth May, 1869, for the sum of \$165 47, the amount of the note then



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Christen v. Rhulman.

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due, and it was further decreed "that said plaintiff have judgment against said defendant for the further sum of \$500, to become due on the twenty-third September, 1869, \$500 to become due on the twenty-third September, 1870, \$500 on the twenty-third March, 1870, and \$500 to become due on the twenty-third March, 1871."

We are not aware of any law authorizing judgment in such a case as this, save for the amount due at the moment judgment was rendered. 6 N. S. 685.

It is therefore ordered that the judgment appealed from be reversed and that plaintiff have judgment against defendant for the sum of one hundred and sixty-five dollars and forty-seven cents, with interest from March 23, 1869, and costs of lower court, and with attaching creditor's privilege, and that plaintiff pay costs of appeal; this without prejudice, however, to any privilege plaintiff may have acquired under the attachment for debts not due.

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No. 2442.—SUCCESSION OF S. ANGLADA.—Opposition to Tutor's account by the Heir emancipated.

In this case all the questions in dispute between the tutor and the minor were referred to an auditor for adjustment, who made his report, which was homologated by the judge *a quo* and judgment rendered thereon in conformity with the terms and conditions of the report. One of the conditions of the report was that in case the minor refused to receive a building which had been erected on the minor's property by the tutor without authority of law, that then the tutor should have the right of removing said building from the premises. The minor subsequently refused to pay for the building.

Held—That the judgment being in the alternative, giving the minor the right to accept or reject the building, and in the latter case the tutor had reserved to him the right of removing it, that as the minor had refused to accept the building, the tutor could not claim to be credited with the value of the building on the amount found to be due by him as tutor to the minor, but that he was left to exercise his right secured to him by the judgment of removing the building.

**A** PPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. T. A. Bartlette*, for appellant. *J. W. Thomas*, for appellee.

WYLY, J. In the judgment of thirty-first of May, 1869, the court below settled all the issues except as regards the interest due by the tutor on the revenues of the property, which question was referred to an auditor appointed by the court with instructions to compensate the interest found to be due by the tutor with the interest due by the minor "on the disbursement of \$600 made by said tutor in the erection of a back building on the property of said minor," twenty days being allowed the auditor to file his report.

In the account thus homologated we find the following statement in reference to the disbursement by the tutor of \$600 for the building on the property of the minor, viz: "The value of a two-story frame building covered with slate, 26x21, erected in the rear of the premises

at the expense of S. Font, tutor, which building increases the value of the premises belonging to the minor, situated at the corner of Basin and Julia streets, which cost the sum of \$600. If the minor requires that the building should remain, she becomes indebted for its value, or, in case of refusal, the tutor demands the right to remove the same from the premises." With this statement in the account of the tutor, the item of \$600 charged up against the minor was homologated.

The auditor found the tutor indebted to the minor \$1790 85, and he found the minor indebted to the tutor \$911 02, the cost of the building including five per cent. interest from 1860.

Before the report of the auditor was homologated the opponent, who is the sole heir, emancipated by marriage, disclaimed and waived a right to the building erected by the tutor on her property without authority of the court, and for which she is charged \$600, with interest since 1860, and she claimed judgment for the full amount found to be due her, to wit, \$1790 85, without allowing credit for the value of said building. The court gave judgment on the eleventh of June, 1869, homologating the auditor's report showing the indebtedness of the tutor to the opponent, \$1790 85, and rejecting the credit of \$911 02, the cost of the building and interest; and considering the disclaimer by the heir of the building mentioned in the account of the tutor and also in the report of the auditor, the court decreed that the tutor have the right to remove the said building from the premises of the minor. From this judgment the appeal has been taken by the tutor.

We are of opinion that the judgment of the court below is correct. Indeed, there is no dispute as to the correctness of the \$1790 85 found in the auditor's report to be due by the tutor to the heir. But it is insisted that the credit of \$911 02 allowed by the auditor to the tutor for the cost of the building, including interest from 1860, ought to be allowed, and that amount deducted from the amount of the judgment, because in the judgment of the thirty-first of May, 1869, the court dismissed all opposition to the account except that part referred to the auditor, and in dismissing the opposition to the disbursement of \$600 for the building, the court virtually ratified that expenditure made by the tutor, and could not by a subsequent judgment reverse it, no appeal having been taken from said judgment of the thirty-first of May, 1869. This would be true if the heir had been charged unconditionally in the account with the cost of the building. But in homologating the account the item referring to the disbursement for the building became the judgment of the court, and how was that item entered in the account? It was in the alternative, to wit: "If the minor requires that the building should remain, she becomes indebted for its value, or in case of refusal, the tutor demands the right to remove the same from the premises."

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 Succession of Anglada.
 

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Now, the heir refused to accept the building, as she had the right to do under the judgment of the thirty-first of May, 1869; then why should the amount in her favor in the auditor's report, to wit, the \$1790 85, be credited with the cost of the building erected on her property by the tutor without authority of the court? She certainly was not chargeable with the cost of property she had the right under the judgment of the thirty-first of May, 1869, to refuse to accept from her tutor, and which she did refuse to accept at the trial of this case in the court *a qua*.

The court did not err, therefore, in giving the heir judgment for the amount found to be due her, and in decreeing that the tutor be permitted to remove the building which he had illegally erected on the premises of the minor.

The appellant raises many other questions, which we can not consider in revising the judgment before us, which is the judgment of the eleventh day of June, 1869. There are two other judgments in the record, which were rendered before the one now under revision, in which these questions were disposed of, and as no appeal was taken therefrom, we will not examine the correctness of said judgments. The appellee also raises a question which we can not examine. It is as to the value of the rent of the property of the minor occupied by the tutor in 1863, 1864 and 1865. This question was settled in the judgment of the thirty-first of May, 1869, from which no appeal was taken. Judgment affirmed.

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No. 3367.—JAMES H. YOUNG *v.* MAGAZINE STREET RAILROAD COMPANY. MAGAZINE STREET RAILROAD COMPANY *v.* JAMES H. YOUNG. (Consolidated Cases).

In the year 1861 a contract was entered into between the City of Jefferson and Joseph Kaiser, granting to the latter the right to build street railroads through the corporate limits of the city. Article ninth of the contracts stipulated that in case of failure by the contractors of either of said roads to commence or complete either of said works, or any part thereof, within the period herein prescribed, or in case the Common Council be dissatisfied with the manner in which the works are being executed, the Council shall have the right to annul the contract without putting the contractor in default. It was further stipulated that in case the contractor fails to complete the works within the time prescribed, he shall forfeit all claims for work done, and the city shall have the right to *resell* the privilege and right of way at the risk of the contractor and his sureties *in solido*. Held—That under the authority given in this section to *resell*, nothing but the right of way and privilege could be resold; and that if the road was once fairly completed this provision, having fulfilled its coercive purpose, ceased to have any further force.

**A**PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. Frank N. Butler and B. King Cutler*, for plaintiff and appellant. *Thomas J. Semmes and Rufus Waples*, for defendants and appellees.

This case was tried by a jury in the court below.

Howe, J. The principal point involved in this litigation is in regard to the right of the Common Council of Jefferson City, in the year 1870,

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Young v. Magazine Street Railroad Co. Magazine Street Railroad Co. v. Young.

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to annul the contract for building the Magazine Street Railroad, and to sell the railroad and its appurtenances to the plaintiff, James H. Young.

In 1861 a contract was entered into between the city and Joseph Kaiser, granting to him as the highest bidder a right to build the railroad. The time to complete the work was afterwards extended to January 1, 1866, and on the thirtieth May, 1866, the Magazine Street Railroad Company, party hereto, was organized, and became the owner of the road.

On the first March, 1870, the Common Council of Jefferson passed a resolution to annul the contract, and on the second March, 1870, through a committee, sold the whole property to Young.

The proceedings for this forfeiture and sale were secret and hurried, and the price was vile, but in the view we have taken of the case, it is not a necessary, as it certainly would not be a pleasing task, to enter into a full detail of the facts. If the Common Council had no power to sell as they did, and what they did, it matters little to Young, their vendee, whether their method of procedure was praiseworthy or not.

The section of the contract on which Young relies is as follows:

“*Ninth*—In case of failure by the contractors of either of said roads to commence or complete the above described works, or any part thereof, within the period herein prescribed, or in case the Common Council be dissatisfied with the manner in which the works are being executed, the Council shall have the right to annul the contract, without putting the contractor in default, in the manner indicated in article 1905 of the Civil Code, and without applying to a court of justice to annul the same, and without indemnity; and in case the contractors shall at any time abandon the works, or fail or refuse to finish and complete the same in conformity with his contract, he shall forfeit all claims for indemnity for the work done by him up to the date of abandonment, and the City of Jefferson shall thereby be discharged from any and all liabilities therefor; and in case either of such annulment or of such abandonment, the City of Jefferson shall have the right to *resell the privilege and right of way* at the risk of the contractor and his securities *in solido*.”

It is apparent that this section confers no right to resell anything but a right of way and privilege. The phraseology, and especially the use of the word *resell*, would indicate that the city, in case of annulment, was to reconvey to some purchaser what by the original contract it had conveyed to Kaiser. So that it seems preposterous for Young to claim that under this clause the city could sell him mules, cars, railroad iron, stables, harness, and even money in the “change boxes,” when the clause itself refers only to a resale of an incorporeal right granted to Kaiser in 1861.

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But waiving this point, as of but partial application, we are satisfied from the testimony that the road was fairly completed on the first January, 1866, and that from that moment the section quoted, having fulfilled its coercive purpose, ceased to have any further force. Whether the parties owning the road continued to keep it in good repair, whether they had their cars properly lighted, whether they ran their cars regularly and with proper speed, are questions which have nothing to do with this case. Delinquencies of this sort are provided for by other penalties in the contract than annulment and sale.

The jury gave a verdict in favor of the Magazine Street Railroad, and we think it a just one.

Judgment affirmed.

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No. 2460.—MARY McDUGAL WILLIAMS, Wife of WILLIAM VON PHUL,  
v. SUCCESSION OF A. A. WILLIAMS.

The act of Congress, approved March 2, 1867, which authorizes the transfer of causes, under certain circumstances, from the State courts to the federal courts, can only be invoked by the plaintiff or defendant in the cause. It can not be invoked by an intervenor who voluntarily makes himself a party to the suit. Nor will the transfer be allowed if it be made for the first time by the plaintiff or defendant in the appellate court of the State. Such applications to transfer causes from one jurisdiction to another, should be made before the cause was tried in the court of the first instance.

**A**PPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. Hays & New and Campbell, Spofford & Campbell*, for appellant. *H. J. Grover*, for appellee.

TALIAFERRO, J. Alfred A. Williams died in September, 1863, and his wife in 1854. He became tutor to his three minor children, of whom the plaintiff, now the wife of Von Phul, was one. She sues the estate for \$71,571, with five per cent. interest from first of March, 1863, being, as she alleges, for property and money derived by inheritance and donations, and which her father as tutor received and never accounted for. She avers that no inventory of her property when a minor was ever made by her tutor, and that he failed to present accounts of his administration of her property.

The dative testamentary executor, himself a coheir with the plaintiff, and another to the succession of their common father, admits that the plaintiff has rights and valid claims against the estate, but says the extent and amount of the same are unascertained and unliquidated; and for the purpose of a legal adjustment thereof, he denies the allegations of the plaintiff's petition and requires proof.

An intervention was filed by Vernon K. Stevenson, a judgment creditor of the estate for \$74,000; Joseph A. Cassat for \$9500 by note, and N. King Knox for a claim of \$10,601. They contest the claims of

the plaintiff as illegal, and deny that she has a legal mortgage on the property of the estate.

The plaintiff had judgment in her favor in the court below for \$88,845 87, with five per cent. interest from first of September, 1863, on the sum of \$87,012 54, and eight per cent. interest from twelfth of August, 1868, on the sum of \$1833 33½. The intervention of Stevenson and that of Knox were dismissed; the judgment set up by Stevenson was decreed null and without effect. From this judgment the intervenor, Stevenson, alone has appealed.

In this court the appellant has filed his affidavit under the provisions of the act of Congress, approved second March, 1867, entitled "An act to amend an act entitled an act for the removal of causes in certain cases from State courts," approved July 27, 1866, he being a citizen of New York. He declares that "from prejudice and local influence he has reason to believe, and does really believe, he will not be able to obtain justice in the Supreme Court." He tenders his bond with security, as required by the statute referred to, and prays for the removal of this cause, so far as he is a party and interested therein, to the Circuit Court of the United States for this district.

This court being exclusively appellate in its jurisdiction, is confined to the consideration of appeals taken from final judgments rendered by the inferior courts of the State, except in cases of interlocutory decrees calculated to work irreparable injury. The appellant, if the attitude he occupies in this litigation entitles him to the benefit of the act of Congress referred to, having failed to interpose his right to have the same transferred before the final judgment in the case was rendered by the State tribunal from which he appeals, we think he can not now invoke the aid of the law of Congress. That act provides for the transfer of causes "at any time before the final hearing or trial of the suit." This right, too, seems to be restricted to cases where a citizen of another State than that in which the suit is brought is either plaintiff or defendant. The appellant in the case before us is neither plaintiff nor defendant. He is an intervenor, voluntarily making himself a party in a suit between citizens of the same State, the result of which could in no wise have affected his rights had he kept aloof from the controversy. He chose to run the chances of obtaining a judgment in his favor in a State court, and failing in that, he seeks for better fortune in another tribunal, which is incompetent to revise the judgment appealed from, and which is without jurisdiction *ratione personæ* of the original parties to the suit. We conclude, therefore, that he has no right to claim a transfer of the cause, and his application is therefore refused.

On the merits we find no error in the judgment. The notes on which the appellant's large claim is founded were proved to have been

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Mary McDougal Williams v. Succession of Williams.

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given for a loan of Confederate money. It was also established that at the time the loan was made and the contract entered into, Stevenson lived in Nashville, Tennessee, then within the Federal lines, and that Williams, who gave the notes, lived in Louisiana. The plaintiff appears to have established with sufficient certainty her claims against the succession, and they were properly allowed.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

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No. 3278.—STATE ex rel. HERNANDEZ v. B. F. FLANDERS, Mayor, et al.

A law will not be declared unconstitutional unless it be clearly so.

The decisions by the Legislature of a question of public policy will not be revised by the courts.

There is a wide difference between the funds and franchises of a political corporation and those of a private person.

The charter of a municipal corporation is not a contract (but a mandate) and the Legislature has the right to regulate and control the corporation and its funds and franchises, because the whole interest and franchises are given for the public use and advantage. 5 An. 661.

By section forty of the act of 1870, chartering the city of New Orleans, the city was directed to fund its floating debt, and by the act No. 103 of 1871 it was directed to include in the statement thereof all registered certificates and bills issued or approved (under the former charter) by the chairmen of the "Committees of Finance" and registered by the Controller or his deputy, which at the time of presentation for payment or redemption as part of the floating debt were held and owned by *bona fide* purchasers for value; and such holders were authorized to enforce their rights in this regard by mandamus, and pending proceedings by mandamus were confirmed.

It appearing that the relator was the *bona fide* holder for value of a certificate of this sort, signed by the chairmen, who had the legal authority to sign it, and duly registered, and that as to this particular certificate there was no sufficient proof of fraud as between the committees and the parties to whom it was originally issued. Held—That the legislation quoted above cured any informalities prior to such signing and issuance; that the question whether the *bona fide* purchaser of the certificate should suffer, or the city should pay a claim thus certified by her proper officers, was one of public policy within the legislative discretion, and that the relator was therefore entitled to a mandamus.

**A** PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. Semmes & Mott*, for relator. *George S. Lacey*, for respondents.

Howe, J. The relator asked for a mandamus to compel the Mayor, the Administrator of Finance and the Administrator of Public Accounts of New Orleans to place on the statement of the floating debt of the city a certificate of indebtedness, in accordance with section forty of the city charter of 1870. Laws of 1870, extra session, p. 46.

The certificate in question was purchased by relator in open market at the market rate, and presumably in good faith. It is as follows:

"FINANCE COMMITTEES,

City Hall, New Orleans, January 10, 1870.

The Controller is hereby authorized to warrant on the Treasurer, in favor of John Coleman & Co., for the sum of four thousand one hun-

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State ex rel. Hernandez v. Flanders, Mayor, et al.

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dred and thirty-one 16-100 dollars, and charge the same to account of contingent, in accordance with resolution No. 1467.

No. 264. (Signed)

VICTOR PRADOS;

W. H. PEMBERTON,

Chairmen Finance Committees.

Registered March 1, 1870.

(Signed)

PAS. LABARRE,

Deputy Controller.

(Indorsed)

JOHN COLEMAN & CO."

The resolution No. 1467 thus referred to was dated May 19, 1867, and provided an extra compensation of twenty-five per cent. to Coleman & Co. for paving Rampart street, under their unfinished contract of May 9, 1860, giving as a reason that the price of materials had been enhanced in this rate by the war.

The respondents allege several causes why the mandamus should not issue, which we will notice in their order:

*First*—That the proceeding against them by mandamus was prohibited by the act of March 17, 1870. This prohibition appears, however, to have been removed by the act of May 2, 1871, hereinafter quoted, and does not seem to be further relied on by counsel for the defense.

*Second*—That the resolution 1467 referred to in the certificate was void as giving a gratuity and in contravention of the city charter in force at the time.

This point refers, we understand, to the question of authority in the Common Council to pass the ordinance. To this the relator replies that if the Common Council was without power to pass the ordinance this defect has been remedied by the provisions of section forty of the city charter of 1870 and by the act of May 2, 1871, laws of 1871, No. 103, which refers specifically to the class of certificates to which the one in suit belongs. The latter law is entitled "An act defining the obligations of the city of New Orleans to be redeemed as part of the floating debt under the provisions of section forty, act No. 7, approved sixteenth March, 1870, and to enforce the same," and reads as follows:

"That section forty of act No. 7, approved sixteenth of March, 1870, embraces and was intended to embrace as obligations of the city of New Orleans all registered certificates or bills issued or approved by the chairmen of the committees of finance and registered by the Controller of the city of New Orleans, or his deputy, which at the time of presentation for payment or redemption as part of the floating debt were held and owned by *bona fide* purchasers for value, and it is hereby made the duty of the Administrator of Public Accounts, the Mayor and Administrator of Finance to place all such registered cer-



tificates or bills on the statement of the floating debt, and in case of refusal, the holders of said registered certificates or bills are hereby authorized to proceed by writ of mandamus to enforce the duty herein imposed on the officers aforesaid.

*"Be it further enacted, etc.,* That this act shall take effect from and after its passage, and any proceeding by mandamus or otherwise heretofore taken by holders of said obligations are hereby confirmed."

We think the case is with the relator on this point. It seems to have been believed by the Legislature that the former municipal authorities had contracted a floating debt; that certificates of this indebtedness had been thrown on the market and purchased by *bona fide* holders; that good faith and public policy required that such holders should be paid, and that it was better that some claims made by doubtful authority should be settled than that the credit of the city should suffer. We apprehend that the effect of this legislation was to supply the want of power in the city and in the officers who signed the certificates, if any such want existed.

*Third*—That the certificate in suit can not be recognized as of any legal force because, first, it is not embraced in the resolution No. 1467; because, second, the amount of the twenty-five per cent. allowance was not certified by the City Surveyor and approved by the chairmen of the Committees of Streets and Landings; and because, third, the work had never been measured by the City Surveyor.

The certificate, on its face, is issued under the resolution 1467; it is in regular form; and we do not think the reasons thus urged under the third subdivision of the answer furnish any defense to this proceeding in the face of the legislation above quoted. As already suggested that legislation must have proceeded on the theory and for the purpose of sustaining the credit of the city by protecting the *bona fide* purchasers of the certificates emitted by its officers, in customary form, even though issued without the prescribed preliminary formalities.

*Fourth*—The respondents further answered that a great fraud upon the city was sought to be consummated at the time the certificates, including the one in question, were issued to Coleman & Co.; that there was, in fact, an over issue of certificates under the resolution to the amount of about \$20,000 by the then chairmen of the Finance Committees.

The evidence certainly shows that the business of these Finance Committees was conducted in a grossly irregular way, but it hardly amounts to a showing that the certificate in controversy was itself fraudulent in its inception. But at any rate we are of opinion that the legislation above cited disposes of the case in favor of the relator. Certificates of indebtedness issued by a former city government were afloat; some were in the hands of *bona fide* holders, but were subject

to the imputation of irregularity or even graver objections. The question whether the *bona fide* purchaser should suffer or whether the city should bear the burden saddled upon it by a former administration, was a question purely of public policy. As such it belonged to the political department of the government, and the decision of that department should not be reversed by the judiciary. We can not perceive that the acts quoted are in conflict with the Constitution, and it is, therefore, in our opinion, the duty of the courts to enforce them by the process prescribed.

The judgment of the lower court in favor of relator should, therefore, be affirmed.

Judgment affirmed.

Wyly, J., being absent, took no part in this decision.

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#### ON REHEARING.

HOWE, J. A rehearing having been granted in this case and an oral argument made, we have had it under advisement for some time and given it a careful examination, but we are unable to change the views heretofore expressed.

The certificate of indebtedness upon which the proceeding is brought is genuine; it is duly signed by Prados and Pemberton, chairmen of finance committees, who were authorized by law to sign such documents, and registered by P. Labarre, Deputy Controller, and there is nothing to show that it was a fraud, whatever irregularities there may have been in the other dealings of Coleman & Co. with the committees. The relator is admitted to have bought it in good faith, and he therefore is entitled to his mandamus under the act of 1871, No. 103. We can not find that this act is unconstitutional, and we can not refuse to obey it simply because we may not think it a wise law. Our views of public policy, like those of other citizens, may be expressed at the ballot box, but we have no right, as judges, to enforce them by a decree of court.

The fact that legislative power may be abused, is no argument against its existence; and it has been long settled in this State, as well as in American jurisprudence generally, that a law will not be declared unconstitutional unless it be clearly so. Indeed, in the earlier days of the Republic, the right of courts to declare any law unconstitutional was gravely doubted.

It is in vain to argue such a case as this by analogies drawn from the rights of private individuals. Analogies are proverbially deceptive, and there is a wide difference between the funds and franchises of a private person and those of a political corporation. A public, and

especially a municipal corporation, is created for a political purpose. 2 Kent, 275. It is invested with subordinate legislative powers, to be exercised for local purposes connected with the public good, and is subject to the control of the Legislature of the State. 2 Kent, 275. When it holds specific property for municipal purposes, that property is said by some to be invested with the security of private rights, but in most other respects the State, through the Legislature, has full control. "If the corporation be public in the strict sense," says Mr. Kent (vol. 2, 301), "the government has the sole right as trustee of the public interest, to inspect, regulate, control and direct the corporation and its funds and franchises, because the whole interest and franchises are given for the public use and advantage."

"In respect to public or municipal corporations, which exist only for public purposes, as counties, cities and towns, the Legislature, under proper limitations, have a right to change, modify, enlarge, restrain or destroy them, securing, however, the property for the use of those for whom it was purchased." 2 Kent, 305.

"A public corporation instituted for purposes connected with the administration of the government may be controlled by the Legislature, because such a corporation is not a contract within the purview of the Constitution of the United States. In those public corporations there is in reality but one party, and the trustees or governors of the corporation are merely trustees for the public."

These principles, stated nearly fifty years ago by Mr. Kent as the better opinion of the American courts, were adopted to the fullest extent by the Supreme Court of Louisiana at least a quarter of a century ago (3 An. 306, 1 An. 162, 5 An. 665, 11 An. 54, 1 An. 438), and nothing could be plainer and broader than the views expressed in this regard by the court through Mr. Justice Preston in the case of *Police Jury v. Shreveport*, 5 An. 661, in the year 1850. Every argument as to unconstitutionality made in this case was made in that and in the cases to which the organ of the court referred, but without avail. We are at a loss to perceive any good reason why we should ignore this well settled jurisprudence, and usurp a sort of general superintending control over the Legislature in these matters.

Our predecessors, as early as the year 1813, disclaimed such a power even over inferior courts, (3 M. 42), and surely it ought not to be hinted at as existing with regard to a co-ordinate branch of the government.

It is therefore ordered that the judgment heretofore rendered by us remain undisturbed.

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HOWELL, J., *dissenting*. My first reason for not concurring in the opinion of the court in this case, after further examination, is that the instrument on which the proceeding is based is not strictly a "regis-

tered certificate," as is usually understood by such words. It is simply an authorization to the Controller to draw a warrant on the Treasurer for a specific sum under a particular ordinance. The Administrator of Public Accounts, who occupies the position of the Controller under the former charter, testifies that it is not what is properly termed a "registered certificate;" and the facts of this case show the importance and necessity of adhering strictly to legal forms. Secondly, if it be viewed as a registered certificate, in the contemplation of section forty of the present city charter, it is not a legal obligation of the city, having been issued without consideration, without legal authority, and in violation of the good faith of the alleged payees, as plighted in a notarial act signed by them and the Mayor of the city, in special reference to this very matter.

The record shows clearly, by the contractors' own list of their alleged losses, that it was issued as a gratuity or bonus on a contract for paving Esplanade street, and as stated on its face by virtue of ordinance 1467, which by its terms and the express construction thereof by the contractors in the notarial act above referred to, limited the gratuity or bonus to the paving of a part of Rampart street.

The manner and circumstances of its issuance, and that of others like it, are unusual and not warranted by any provisions of the law and ordinances relating to the subject. A recital of them here need not be made. Suffice it to say, the Finance Committees evaded any action themselves, although frequently pressed, and the chairmen seem to have left it to their secretary to prepare the documents and ascertain from some other employé in the City Hall the particular ordinance under which they could be issued, and then affixed their official signatures, for reasons which are not legitimate.

But my most serious objection relates to the act No. 103 of 1871, which I can not think has made this a valid obligation of the city, and imposed on us the duty of ordering the defendants to acknowledge it as such. This act is entitled "An act defining the obligations of the city of New Orleans to be redeemed as a part of the floating debt, under the provisions of section 40 of act No. 7, approved March 16, 1870, and to enforce the same," and it declares that said section embraces, and was intended to embrace, as obligations of the city, all registered certificates or bills issued or approved by the Chairmen of the Committees of Finance, and registered by the Controller of the city or his deputy, which at the time of its presentation for payment or redemption as part of the floating debt were held and owned by *bona fide* purchasers for value, and it authorizes the writ of mandamus to compel the officers, who are the defendants, to place the same on the statement of the floating debt, and specially confirms any proceeding by mandamus theretofore taken by holders of said obligations.

The proceeding in this case was then pending, and the last clause discloses the motive of the act, while the record shows that the relator is the holder of other "obligations" of the same kind. In this proceeding, thus *confirmed* by an act of the Legislature while it was pending in the lower court, the question of the validity, the consideration, the good faith, the very existence of the alleged "obligation" was then at issue, and it becomes a matter of very grave inquiry whether or not the Legislature can thus forestall judicial action and decide upon the rights of litigants, if it be contended that the document before us is embraced within the above act.

I assume it as indisputable that when the relator, Hernandez, acquired the *instrument* in controversy, for I can not call it a "registered certificate or bill," he acquired only the rights of the alleged payees, Coleman & Co., and theirs being contested as not well founded, his were no better; and I affirm that the questions, whether or not they are well founded, whether or not there is an existing obligation, and how it is evidenced, are judicial questions which the Legislature is incompetent to determine. Indeed, the question was presented to and pending before a court of justice by the voluntary action of the relator himself, and I am unfamiliar with that principle of government or justice which authorizes the legislative department to take jurisdiction of and decide disputes properly pending in the judicial, a co-ordinate department of the government, and order the latter to execute those decisions. Although the express inhibition of interference does not exist as a separate clause in the present Constitution, yet its force and power just as clearly exist in the decision or distribution of the powers of government made as if expressed. See Titles II, III, IV. That the Legislature *in its sphere* is supreme, save as restricted by the Constitutions of the State and United States, I need not deny; but I maintain that its *sphere* is only that of *legislation*, and for the purposes enunciated in the preamble to the Constitution, and that the whole Constitution, taken together, contains, besides specific prohibitions, distinct limitations upon the action of the Legislature, which are prohibitory in their nature and effect. The vesting of the judicial power of the government in certain courts is a prohibition to the Legislature of the exercise of any such power. The Legislature may make, modify and repeal laws, but in doing so it can not take from any person the rights he may have acquired under a particular law; nor can it assume the duties and powers of the judicial department, and decree or adjudge how the law shall be administered in relation to a particular right. The duty of interpreting the laws made by the Legislature belongs to the judicial department, and it is that alone which has authority to examine and decide when a civil obligation has been incurred or violated, and give the judgment necessary

in the premises. All this is fundamental. See 11 R. 414. Now, the alleged rights and obligations involved in this controversy, if any exist, spring from the contract between the city and Coleman & Co. for the paving of certain streets, and it is for the courts to determine whether there is an obligation on the part of the city to pay the sum sought to be secured in this proceeding.

It is true the corporation of New Orleans, a municipal corporation, is the creature of the Legislature, and subject, in the words of Mr. Kent, "*under proper limitations*," to be changed, modified, enlarged, restrained or destroyed by the Legislature; yet, as a creature, it is endowed with a volition, a will, which it alone can exercise. It can make contracts, incur obligations, possess property, provide or raise means or revenue, under the formalities prescribed by the Legislature. But having once exercised these powers, its rights and liabilities, in case of dispute or controversy, are to be determined by the judiciary. In case of dissolution even the Legislature is bound to "secure the property for the uses of those for whom it was acquired." 2 Kent 305; 9 Cranch 52; Greenleaf's Ev. § 331; 4 Scammon 269. The Legislature may ratify or authorize the corporation to ratify acts done and contracts entered into by its officials without proper authority or the observance of prescribed forms; but it can not compel the corporation to acknowledge and pay what it does not owe, nor can it enrich an individual at the expense of the corporate funds. Such acts are mere spoliation. It may, as it has done, provide for the manner of liquidating the obligations of the city, and direct how means may be raised for finally paying them, but it can not determine what are obligations, nor legalize a fraud.

In my opinion, it is our duty to designate as unconstitutional (8 An. 149) whatever in act 103 of 1871 may be considered as establishing conclusively the validity of all certificates or other evidences of debt, whether fraudulent or not, issued by the Chairmen of the Finance Committees and registered by the Controller or his deputy, and compelling the defendants, without the right of contesting their correctness, to place them on the statement of the floating debt, and as making in the hands of the relator, Hernandez, a legal obligation, what had no valid existence in the hands of Coleman & Co. Hernandez, by well established rules of law and equity, took the instrument in question at his own risk, and no statute can, by retroactive effect, increase his rights against the city. Art. 110 Constitution.

It is not so much the want of the observance of prescribed formalities in the issuance of this document, as it is its reality, its validity, its cause that is involved. An obligation without a cause is void, and the Legislature can not make it valid by subsequent enactment. Nor do I think the legal principles drawn from the authorities cited in

support of the relator's demand, sustain the doctrine on which alone it can be allowed. The control which those authorities recognize in the Legislature over a municipal corporation, does not extend to the arbitrary appropriation of the funds of the corporation to private advantage, nor to the exercise of judicial powers, nor yet to compelling the acknowledgment and payment by a municipal corporation of what is not due, with the view as a public plea to preserve its credit, a measure which must, in my opinion, produce the opposite effect.

But, to conclude, I think act 103 of 1871 may be construed, without doing violence to its words, to apply only to certificates and bills, issued without proper form and authority, but for a real, valid consideration, and to authorize the writ of mandamus against the city officials in regard to them. The construction given to it in behalf of the relator, makes the courts the mere instruments of the Legislature to do what I am constrained to designate a public, dangerous wrong.

WYLY, J., *dissenting*. In the outset I deem it proper to inquire into the character of the claim which the relator seeks by process of the court to compel the defendants to place on the statement of the floating debt of the city of New Orleans. Is it a valid obligation, or is it a fraudulent claim, for which the city is not liable? From the evidence, I have no doubt that it was a palpable fraud from the beginning; that it was never contracted by the city of New Orleans or any one authorized by it, and that the city received no consideration whatever therefor, and is not bound, either in law or equity, to pay it. What are the facts?

On the nineteenth day of May, 1869, Coleman & Co. obtained from the Common Council of New Orleans the approval of resolution No. 1467, N. S., giving to them twenty-five per cent. additional upon the city's share of the contract price for paving Rampart street from Common to Esplanade; or, in dollars and cents, the sum of \$37,125 78. Such relief was bestowed upon the express understanding that Coleman & Co. should present no further claim for a gratuity, and particularly no claim for a bonus on the Esplanade street contract. With a view to obtain the twenty-five per centum on the Rampart street contract, Coleman & Co. executed a notarial act, containing a clear and distinct disclaimer on their part of any right or pretension to twenty-five per cent. additional, except upon the city's share of the contract price for paving Rampart street.

Notwithstanding these facts, the Chairmen of the Joint Committees of the Board of Aldermen and Assistant Aldermen issued fifteen certificates of indebtedness, amounting to \$57,815 33—an excess of \$20,729 85 over the sum allowed by the resolution of the Common

Council. Among the certificates thus issued in excess was the one which forms the basis of the present proceeding, and that certificate is clearly shown by the evidence not to have been issued upon the Rampart street contract, in conformity with the resolution of the Common Council and the act executed by Coleman & Co., but upon the Esplanade street contract, in direct opposition to such resolution and specific agreement.

Here Coleman & Co., having several paving contracts with the city, obtained the gratuity mentioned in resolution No. 1467 upon the express condition "that the increase of twenty-five per cent. to be paid by the city shall apply only in the case of the Rampart street contract." And to remove all doubt as to the understanding upon which the ordinance was passed, the Mayor required Coleman & Co., in a notarial act, to renounce and relinquish all claims they might have for an "increase of twenty-five per cent. upon each and every one of the several contracts which the said firm now have with the city of New Orleans for the paving of various streets with square blocks, saving and excepting, however, the one for Rampart street from Canal to Esplanade street, to which contract only shall such twenty-five per cent. apply;" and moreover they bind themselves and heirs "at all times to acknowledge the force and validity of the relinquishment, and to admit and sustain the intent and meaning of said resolution." \* \* \*

In the face of the condition stipulated in resolution No. 1467, and in the face of their solemn pledges in the notarial act, Coleman & Co. obtained from the Chairmen of the Finance Committees the certificate or order for \$4131 16 upon which this suit is based, which certificate or order was not issued upon the Rampart street contract, but upon the Esplanade street contract, and which order bore upon its face the false statement that it was issued in accordance with resolution No. 1467. Here the Chairmen of the Committees of Finance and Coleman & Co., the payees of the order, deliberately conspired to perpetrate a fraud upon the city to the amount of \$4131 16, and attempted to cover it by placing the false statement upon the face of the certificate that it was issued under resolution No. 1467, when, in truth, it was issued fraudulently and falsely, and contrary to the provision of said resolution. In the face of all this, the counsel for the relator asserts that this certificate was not fraudulent in its inception. I have never seen a clearer and more infamous fraud exposed in a court of justice. There is no proof, however, that the relator, the transferee, participated in or was privy to the fraud out of which arose the claim which he now demands shall be placed on the statement of the floating debt of the city of New Orleans. This may be so, but it gives him no legal or natural obligation against the city. His remedy is against his fraudulent transferers, Coleman & Co. Prados and Pemberton had no



authority to issue this certificate as Chairmen of the Finance Committees; the resolution mentioned in the face thereof did not authorize it, and it is well settled that paper issued by unauthorized agents is not binding on their principal, it matters not in whose hands it may fall. No transfer can vitalize such an absolute nullity, or even impose on the city of New Orleans a natural obligation to pay the innocent transferee, if such he may be called, who purchased the certificate with the statement on its face that it issued in accordance with resolution No. 1467.

In the case of the Louisiana State Bank v. The Orleans Navigation Company et al., 3 An. 301, where the question was whether the city of New Orleans was bound by its indorsement of the bonds of the Orleans Navigation Company, there being no question as to whether the city had authorized the said indorsement, this court, through Chief Justice Eustis, its organ, said: "It would seem to be evident and reasonable that where the indorsement is by an agent and a person not acting in his own right, and there is a direct reference in the body of the instrument to the procuration or authority under which the indorsement is made, a person who holds the instrument by virtue of the indorsement is charged with notice of the power under which it is made. We must therefore consider the plaintiffs cognizant of the resolutions of the City Council of the twenty-ninth of July and the fifth of August, and that the right to recover depends on the validity of those resolutions and the acts done in virtue of them."

Here the validity of resolution No. 1467 is not questioned, but the relator must be held, under the settled jurisprudence of this State, to be cognizant of the fact that this certificate for \$4131 16 issued in violation of the express provision of that resolution, because he is charged with notice of the limited power conferred by it on the Chairmen of the Committees of Finance, and because he is charged with notice of the acts done by virtue of said resolution. Here the agents of New Orleans held power to allow Coleman & Co. the extra compensation of twenty-five per cent. on the Rampart street contract, but could not allow it on any other contract. Having notice of the resolution No. 1467, the relator had knowledge also of the limitation imposed therein. He therefore occupies no better legal position before the court than the perpetrator of the fraud would occupy, because, under the jurisprudence of this State, he is charged with notice thereof.

On the tenth of October, 1870, the relator instituted this suit to compel by mandamus the Mayor, the Administrator of Public Accounts and the Administrator of Finance to do what they refused to do, to wit, to place this fraudulent claim, held by the relator, on the statement of the floating debt of the city of New Orleans, which he insists was their duty by virtue of section 40 of the act rechartering the city, being act No. 7 of the extra session of 1870.

We have lately held, in the case of *Monasterio*, that the section of the statute referred to does not require these officers of the city to place these false and fraudulent claims, such as the one held by the relator, in the "full and correct statement of all the mature obligations of the city," which it declares "shall be prepared by the Administrator of Public Accounts and by him attested under oath, and which shall be further approved by the Mayor and the Administrator of Finance;" \* \* \* that in the meaning of the law only valid claims are to be embraced in that statement, otherwise the law would not require it to be "attested under oath" by the Administrator of Public Accounts, and also to "be further approved by the Mayor and the Administrator of Finance;" that if all claims, whether false or valid, were intended to be put on that statement, it would be useless to prepare it with so much caution, and it would be unreasonable to require these officers to swear to be correct and approve of claims which they know to be false and dishonest.

On the authority, therefore, of the *State ex rel. Monasterio* against these same defendants, a case directly in point where the question was carefully examined by this court, the defendants herein, in my opinion, were right in declining to put this false claim on the statement of the mature obligations of the city.

But the relator contends that his claim, whether valid or not, is covered by act No. 103, approved second of May, 1871, amending section forty of the charter of 1870. This amendment declares that said section forty "embraces and was intended to embrace, as obligations of the city of New Orleans, all registered certificates or bills issued or approved by the chairmen of the Committees of Finance and registered by the Controller of the city of New Orleans or his deputy, which at the time of presentation for payment or redemption as part of the floating debt were held and owned by *bona fide* purchasers for value." \* \* \*

If this act be regarded as a legislative interpretation of section forty of the charter of 1870, it can not be accepted, because it appertains to the judicial and not to the legislative department to interpret laws. 23 An. 225; 3 Howard 546. Construing both statutes together, as they ought to be, I maintain that the only fair and reasonable interpretation is, they do not cover false and dishonest claims like the one held by the relator; that although within the letter they are not within the meaning of the law.

Section forty of the city charter requires to be placed on the statement of the floating debt "all the mature obligations of the city at the date of the passage of this act, to wit: all final judgments, warrants, registered certificates and unredeemed city notes," and this amendment says that section forty was intended also to embrace "all

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registered certificates or bills issued or approved by the Chairmen of the Committees of Finance and registered by the Controller of the city or his deputy." \* \* \* \* \*

Now, although section forty declares that "all judgments, warrants, registered certificates," etc., shall be embraced in the statement of the floating debt of New Orleans, this court held in Monasterio's case that it did not cover the certificate presented by Monasterio, unless that certificate was found to be a valid debt of the city. The amendment extending the provision of section forty to embrace "all registered certificates issued by the Chairmen of the Finance Committees," in like manner ought to be construed to embrace only honest claims or certificates issued by the Finance Committees.

Under resolution No. 1467 valid certificates were issued by the Chairmen of the Finance Committees to the amount of \$37,125 78, and false and fraudulent ones to the amount of \$20,729 85.

Although both classes of these certificates fall within the letter of the statute amending section forty, to my mind it is only the valid certificates that are within its meaning. This is the only just interpretation that can be placed upon this legislation without casting reproach upon its authors, because it would be impossible for honest men deliberately to enact a law compelling anyone to pay a false or fraudulent claim or a claim against good conscience.

Charity, at least to the Legislature, a co-ordinate department, demands the construction that false and dishonest claims were not intended to be embraced in the meaning of the statute, although they fall within its letter.

In all civilized countries law is held to promote honesty, to condemn fraud and to protect the people from spoliation and violence, and it can not fairly be presumed that the authors of the statute before us intended to ignore these beneficent motives solely for the purpose of rewarding the fraud perpetrated by Coleman & Co.

*"Juris praecepta sunt: honesté vivere, alitum non laedere, suum cuique tribuere."*

But the relator contends that his claim, whether valid or not, was intended to be embraced in the statute, and the motive of the law-giver was to promote the credit of New Orleans; that it was a measure of policy adopted by the political department of the State and it is the duty of the court to enforce it. This is a fallacy so transparent that it will not for a moment stand the test of scrutiny.

How is the credit of New Orleans to be advanced by driving it from the protection of the courts, and compelling it to be burdened with debts which it never contracted, and which in no wise inured to its benefit or advantage? Would the credit of an individual be promoted if he were compelled to pay every false claim that might be

trumped up against him? If his property be the common pledge of his creditors, would their confidence be enhanced by a statute placing that pledge within the grasp of every dishonest person?

In justice to the intelligence of the Legislature, I maintain they did not intend the payment of the fraudulent claim held by the relator as a measure or policy to advance the credit of New Orleans. But the position that the Legislature intended the payment of such claims as a measure of policy, is a bald assertion. There is nothing in the statute or its preamble to justify such a purpose. The title of the act is not an act to promote the credit of New Orleans, not an act to bestow a gratuity upon Hernandez, but "an act defining the obligations of the city of New Orleans to be redeemed as part of the floating debt, under the provisions of section 40, act No. 7, approved sixteenth March, 1870, and to enforce the same." The whole purpose of the original act and its amendment was to provide *for the redemption of certain mature obligations of the city*, by requiring them to be placed, in the manner indicated, on the statement of the floating debt, for which funds of the city were to be issued, under section 41 of the charter of 1870. The false and fraudulent certificate of the relator is *not a mature obligation* of the city; and, in my opinion, it does not fall within the meaning of section 40, as amended by act No. 103 of the acts of 1871, especially when that section is read as interpreted in the *Monasterio* case, and in connection with section 41 of the city charter of 1870. But assuming that it was the purpose of the Legislature to compel New Orleans to pay this fraudulent claim, I maintain it is not in their power to do so; that the grant to legislate does not embrace authority to plunder the citizens; that private property can not be taken for private purpose; that the Legislature can not take the property of A to give it to B; that it has not authority to take \$4131 16 from the city treasury for the purpose of bestowing a liberality upon the relator, Hernandez, to whom the city is not bound either by a legal or natural obligation; and that as it can not take the money now in the treasury, it can not compel the city to issue its bonds for the amount payable at a future day.

If private property can not be taken for private purposes at one time, it can not at another, because the taking is absolutely prohibited at any time.

"In respect to public or municipal corporations, which exist only for public purposes, as counties, cities and towns, the Legislature, *under proper limitations*, have the right to change, modify, enlarge, restrain or destroy them, *securing, however, the property for the use of those for whom it was purchased.*" 2 Kent 305.

Notwithstanding the power of the Legislature over these public corporations, their private property is protected. Story on the Constitution, section 1393.

The same author in section 1399 says: "Whether, indeed, independently of the Constitution of the United States, the nature of republican and free governments does not necessarily impose some restraints upon legislative power, has been much discussed. It seems to be the general opinion, fortified by a strong current of judicial opinion, that since the American revolution no State government can be presumed to possess the transcendental sovereignty, to take away vested rights of property; to take the property of A and transfer it to B by mere legislative act. That government can scarcely be deemed to be free where the rights of property are left solely dependent upon a legislative body without any restraint.

"The fundamental maxims of a free government seem to require that the rights of personal liberty and private property shall be held sacred. At least no court of justice in this country would be warranted in assuming that any State Legislature possessed a power to violate and disregard them, or that such a power, so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority, or ought to be implied from any general expression of the will of the people in the usual forms of the constitutional delegation of power. The people can not be presumed to part with rights so vital to their security and well being without very strong and positive declarations to that effect." See also *Wilkins v. Leland*, 2 Pet. 627, 657; *Satterlee v. Mathewson*, 2 Pet. 380, 412, 413, and also *Fletcher v. Peck*, 6 Cranch 67, 134.

"Under our form of government the Legislature is not supreme. It is only one of the organs of that absolute sovereignty which resides in the whole body of the people. Like other departments of the government it can only exercise such powers as have been delegated to it, and when it steps beyond that boundary, its acts, like those of the most humble magistrate in the State who exceeds his jurisdiction, are utterly void." 4 Hill 144.

"The nature and end of legislative power will limit the exercise of it. \* \* \* There are certain vital principles in our free republican government which will determine and overrule an apparent and flagrant abuse of legislative power, such as to authorize manifest injustice by positive laws, or take away that security for personal liberty or private property, for the protection whereof the government was established." \* \* \* 3 Dalas 386.

"The Legislature has not, by the right of eminent domain, the right to take the property of a person to give to another, not even in police regulations." 3 Paige, Chan. N. Y. Rep. 159; 8 Wendell 85; see also 18 Wendell 56, 61, 63; *Cooley on Limitations* 487; 21 Penn. 147.

Authority upon authority might be added in support of the position that the Legislature has not the right to take the money or bonds of

New Orleans and bestow them, as a gratuity, upon the relator, Hernandez; but I think enough has already been adduced to settle the question beyond doubt. I can not, however, refrain from adding the following quotation from Chief Justice Marshall, in which I entirely concur, viz:

"We can not resist the conclusion that it would be a violation of the general tenure and spirit of the Constitution for the Legislature to attempt to deprive any citizen of his property without previously providing compensation therefor. And whenever such acts are passed, we believe it to be the duty of the judiciary to disregard them and consider them as nullities. We can not perceive any reason which shall compel the judiciary to obey a legislative act at war with the tenor of the Constitution and the fundamental principles for the preservation of which the government was instituted, that would not apply with equal force to produce obedience to a legislative act directly opposed to any one of the positive inhibitions of the Constitution. We grant the representatives of the people are the shepherds of the flock, but they are not exclusively such, although vested with great and extensive powers. If through inadvertence or design they should endeavor to sacrifice any one or more as victims, it can not be done so long as the judiciary remain virtuous, intelligent and independent. Both departments must concur to work iniquity before the people can be made to mourn, and in bitterness to curse their government."

In conclusion, I therefore maintain that the Legislature has not the authority to compel New Orleans to bestow its bonds for \$4131 16 upon Hernandez as a gratuity. I can not call the fraudulent certificate he holds a debt of the city. I do not believe that act No. 103 of the acts of 1871, amending section 40 of the charter of the city, ought to be construed to embrace this false claim, because its title does not justify the purpose, and because the evident object of the lawgiver was not to bestow a gratuity, but to provide for the redemption of certain mature obligations of the city by issuing its bonds; and no other fair interpretation can be put upon sections 40 and 41 of the charter of 1870. I see no reason why the lawgiver should intend the city to issue its bonds to redeem the fraudulent certificates issued by the Chairmen of the Committees of Finance. We have held, in Monasterio's case, that such was not intended in regard to the fraudulent certificates issued by the city itself. Now, if it would improve the credit of New Orleans to pay the fraudulent certificates issued by its agents, the Chairmen of the Finance Committees, why would it not have the same effect to pay fraudulent certificates issued erroneously by itself? If it will improve the credit of New Orleans to pay the claim of Hernandez, why would not the payment of Monasterio have the same effect, whether his claim be valid or not?

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This court has said to Monasterio, holding a registered certificate of the city, your claim ought not to be paid if it be fraudulent, as the defendants aver, notwithstanding section 40 declares that *all* registered certificates of the city shall be put on the statement of the floating debt. It now says to Hernandez, your fraudulent certificate issued by the Chairmen of the Finance Committees ought to be paid, simply because the amendment of section 40 declares that "all registered certificates or bills issued or approved by the Chairmen of the Committees of Finance," shall be placed on the statement of the floating debt.

How the payment of fraudulent certificates issued by its agents can improve the credit of New Orleans, more than the payment of fraudulent certificates erroneously issued by itself, I can not imagine. Indeed, the whole theory that the payment of such claims was intended by the Legislature as a policy to advance the credit of New Orleans, is the most palpable legal absurdity I have ever heard advanced in a court of justice.

For the reasons stated, I deem it my duty to dissent in this case.

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No. 3636.—CITY OF NEW ORLEANS v. JOHN H. O'CONNOR. JOHN H. O'CONNOR v. CITY OF NEW ORLEANS. Same v. Same.

The plea of prescription of one, two and three years is untenable against an action for rent. An action for the recovery of rent is only prescribed by three years. C. C. 3538.

**A**PPPEAL from the Fourth District Court, parish of Orleans. *Théard, J. George S. Lacey*, City Attorney, for plaintiff and appellee. *Hays & New* and *F. N. Butler*, for defendants and appellants.

LUDELING, C. J. The above three suits were, by agreement, consolidated and tried together.

The suits of *O'Connor v. The City* were instituted to recover compensation for the use of a square of ground belonging to the plaintiff and used by the city. After those suits were instituted the city brought suit for the expropriation of this property. It is proved and admitted that the property is needed for public use, and the only question in dispute is as to the value of the property and the rents for its use hitherto. The case was tried by a jury, who rendered a verdict for \$2000 for rents and \$28,000 for the price of the grounds. *O'Connor* has appealed. The witnesses who testified in relation to the value of this property varied between \$38,000 and \$56,000. They appear to be well acquainted with the property and the value of such property in the neighborhood. The verdict for the sum of \$28,000 was therefore manifestly incorrect. We think it should have been for \$46,000, that being about the average of the estimates of the witnesses.

The plea of prescription of one, two and three years against the claim for rents is untenable. The claim for rents is prescriptible in three years. C. C. 3538. The suits for rent were instituted within three years.

It is therefore ordered and adjudged that the verdict of the jury be set aside; that the judgment of the district court be annulled, and proceeding to render such judgment as should have been rendered, it is adjudged and decreed that there be judgment in favor of John H. O'Connor against the city of New Orleans for the sum of two thousand dollars for the rent of the square, and that there be judgment in favor of the city of New Orleans against the said John H. O'Connor entitling the said city, upon paying unto John H. O'Connor, his heirs or assigns forty-six thousand dollars, with five per cent. per annum from the seventh of December, 1871, and costs, to divest the title of said John H. O'Connor in and to the square of ground situated in said city and bounded by the river front, Richard, Orange and New Levee streets, and that the said city of New Orleans be subrogated to all the rights which the said O'Connor had to said property. It is further ordered that the appellee pay the costs of appeal.

No. 3350.—J. C. MURPHY & Co. v. CHARLES E. RULH—MRS. RULH, Third Opponent; and R. L. BOWLES v. CHARLES E. RULH—MRS. RULH, Third Opponent.

In this case the property of the debtor had been sold under a judgment, and a twelve months' bond was given for the price, which was less than the amount of the judgment. The widow and heirs of the deceased debtor, left in necessitous circumstances, sought by rule to have the bond or its proceeds applied to the payment of their claim of one thousand dollars under the homestead act. Held—That the property having been sold before the death of the debtor, it no longer formed a part of his succession, nor did the bond which was the price thereof, and the widow and heirs had no claim against the property, nor the proceeds thereof, in payment of their demand.

**A**PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. John H. McKee and Hornor & Benedict*, for plaintiffs and defendants in rule, appellees. *A. J. Villere*, for appellants.

LUDELING, C. J. The plaintiffs, Murphy & Co. and R. L. Bowles, obtained judgments against Charles E. Rulh, and caused his property to be seized and sold on a twelve months' credit. The purchaser gave his twelve months' bond in favor of the sheriff. Afterwards, but before the maturity of the twelve months bond, Charles E. Rulh died, leaving his widow and children in necessitous circumstances.

This suit was commenced by rule against Murphy & Co., J. Martin, R. L. Bowles and J. B. Maynard, to have the proceeds of the twelve months' bond appropriated to the widow and children of the deceased, under the homestead act. There was judgment in favor of the widow



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Murphy & Co. v. Rulh, and Bowles v. Rulh—Mrs. Rulh, Third Opponent.

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and children, and Murphy & Co. and R. L. Bowles have appealed. The property of the deceased having been sold under execution, he ceased to have any right or title thereto, or in the bond given for the price, as it was for less than the amount of the judgments under which the property was sold, and it did not belong to the succession of Charles E. Rulh. The law directs that the widow and children of the deceased, left in necessitous circumstances, and not possessed in their own right of property to the amount of one thousand dollars, shall be entitled to receive *from the succession* of their deceased father or husband a sum which added to what they own will make one thousand dollars. Revised Statutes, p. 333, § 1693.

It is therefore ordered and adjudged that the judgment of the district court be avoided as to the appellants, and that there be judgment against the plaintiffs in the rule, with costs of both courts.

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No. 3674.—MARY F. WEBB v. SQUIRE W. BELL.

If it be shown that the wife brought no dowry into the marriage, and that she has no actual claims against her husband, still she has the right to obtain a separation of property from her husband if she shows that he is in embarrassed circumstances, and that his condition is such that she might loose any property she might receive thereafter in her own right from legacies or otherwise if it was to fall into the community.

24	75
107	484

**A** PPEAL from the Fifteenth Judicial District, parish of Assumption. *Beatie J. Nicholls & Folse*, for plaintiff and appellee. *Walter Guion*, for defendant and appellant.

**TALIAFERRO, J.** This is a suit by the wife against her husband to obtain a separation of property and a dissolution of the community between them.

The petition is opposed by the husband on the ground that there is neither allegation or proof that the plaintiff had, at the time of the institution of this suit, a separate trade or industry of any kind from which she was deriving revenue or means inuring to her own benefit, and which were in danger on account of the embarrassed condition of the husband's affairs. There was judgment in the court below in conformity with the prayer of the petition, and the defendant has appealed.

The questions raised by the pleadings in this case were considered in the case of *Davock v. Darcy*, 6 Rob. 342, and the conclusions arrived at were, that "it would be giving the article of the code too narrow a construction to limit the wife's right to a separation to the cases therein enumerated; that although a woman has brought no dowry and has no actual claims against her husband, she is not absolutely precluded from the right of obtaining a separation of property; that the object of a separation of property is twofold, it provides for the present by enabling the wife to recover her dowry or other claims

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against her husband, and it provides for the future by putting an end to the community and thus securing to the wife her individual acquisitions or gains thereafter in whatever manner obtained."

The doctrine of this case has been reaffirmed by subsequent decisions. 6 An. 633; 7 An. 343; 10 An. 272; 11 An. 525.

It is proved in the case now before us that the wife has a small amount of paraphernal property shown to be worth nine hundred dollars; that the husband is in embarrassed circumstances, owning no property, and that there are judgments against him amounting to more than twenty thousand dollars. The purpose sought by separation of property and dissolution of community in this case seems to be to enable the wife, by the use of her own limited means and those she might obtain through her relatives, to earn for herself and child a support without having her earnings fall into the community.

We think the judgment of the lower court correct.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

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No. 3749.—BOULIGNY & ESCLAPON v. GILBERT LACOUR—NUMA GILLIARD, Intervenor.

An overseer on a plantation has a preference over the furnisher of supplies on the proceeds of the crop for the payment of his wages.

**A**PPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. Ryan & White*, for plaintiffs and appellees. *Lewis & Hunter*, for intervenor and appellant.

LUDELING, C. J. The plaintiffs having sued the defendant for supplies for carrying on his plantation during the year 1866, caused some cotton to be sequestered. Thereupon Gilliard intervened and claimed that defendant owed him one thousand dollars for wages as overseer on the plantation for that year, and that he had a right to be paid in preference to the plaintiffs out of the proceeds of the cotton. The only contest is in regard to the facts whether or not the contract alleged on was really made and whether the intervenor performed the services alleged. The defendant and another witness swear positively that the contract was entered into as alleged and that the intervenor performed the services of an overseer.

In the absence of fraud we do not conceive that the age or inexperience of the intervenor can be taken into consideration in determining his rights under the contract.

It is therefore ordered and adjudged that the judgment of the lower court be amended so as to allow the intervenor one thousand dollars, with legal interest from judicial demand, and that, in other respects, the judgment be affirmed, appellees paying costs of appeal.

## No. 2450.—W. J. JURGIELEWICZ v. LAURA JURGIELEWICZ.

A judgment of divorce *a vinculo matrimonii* rendered on a rule taken by one of the parties on a judgment of separation from bed and board, is absolutely null and void if the opposing party has not been cited nor has appeared to defend the suit.

**A**PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Fellows & Mills*, for plaintiff and appellee. *Cotton & Levy*, for defendant and appellant.

LUDELING, C. J. The plaintiff having obtained a judgment of separation from bed and board on the twenty-eighth of June, 1867, took a rule on the defendant on the eighteenth of March, 1868, to show cause why a decree of divorce *a vinculo matrimonii* should not be rendered, and on the twenty-third day of March, 1868, a final judgment was rendered on the rule in favor of the plaintiff, notwithstanding defendant had made no appearance. From this judgment the defendant has appealed.

We think the judgment is a nullity because the defendant was not legally cited and she did not appear to defend the suit. 18 An. 455, *Gernon v. Hickey*; 10 An. 156, *Leachaud v. Wife*.

It is therefore ordered that the judgment of the district court be annulled and that the plaintiff pay the costs of suit.

Rehearing refused.

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## No. 2420.—EMILE ERLANGER v. BERNARD AVEGNO.

All judgments for money should be expressed in dollars and cents. A judgment given by the court *a qua*, for a certain amount in francs, is therefore erroneous, and will be amended on appeal so as to express the amount in dollars and cents.

**A**PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. T. B. Hart*, for plaintiff and appellee. *Hays & New*, for defendant and appellant.

HOWE, J. The plaintiff obtained judgment against the defendant for 11,580 58-100 *francs*, and defendant appealed.

The only point made by appellant is that the judgment is erroneous, in being rendered for francs instead of for an equivalent amount of dollars and cents.

We think the judgment should be amended in this respect. R. S. 1870, § 4; *Marshall v. Grand Gulf Railroad*, 5 An. 360; *Gallearo v. Pierre*, 18 An. 10.

It is therefore ordered that the judgment appealed from be amended, as to the expression of its amount, by substituting for the number of francs therein stated the sum of two thousand one hundred and fifty-three dollars and ninety-nine cents, and that as thus amended the said judgment be affirmed; appellee to pay costs of appeal.

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Verges v. Prejean & Bernard. Haydel v. Mrs. C. Keller—Bergeron, Opponent.

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No. 3666.—H. VERGES v. PREJEAN & BERNARD. M. HAYDEL v. MRS. C. KELLER—D. BERGERON, Opponent. (Consolidated Cases.)

A mortgage retained in favor of the vendor in an act of sale of real estate must be recorded in the book of conventional mortgages to have effect against third persons. If it be only recorded in the book of conveyances, then subsequent mortgages, which have been regularly recorded in the proper book, will take rank over it in the distribution of the proceeds of the sale of the property mortgaged.

**A**PPEAL from the Fifteenth Judicial District Court, parish of Terrebonne. *Gates, J. E. W. Blake*, for appellant. *F. S. Goode*, for appellees.

HOWELL, J. The only question presented in this controversy is the validity of the registry of the mortgage and vendor's privilege retained by Drausin Bergeron, the third opponent, claiming the proceeds of property sold under a mortgage granted and recorded subsequent to his.

The facts of the case are that the act of sale in which Bergeron's mortgage was retained was registered in the book of conveyances kept by the recorder of mortgages, but not in the book of conventional mortgages, as required by law, while the mortgage of Verges, under which the proceeds were realized, was properly registered. It is contended, however, by Bergeron, that, because during a period of several years, embracing the date of his sale, no registry of mortgages was made in the book of conventional mortgages, the registry of his act of sale in the book of conveyances must be held to be a compliance with law and operate the recording of his mortgage and vendor's privilege, and he quotes several cases as authority to sustain this position. See 2 An. 438, 800; 5 An. 154. In those cases no special book for mortgages was kept by the recorder and all sales and all mortgages were inscribed in the same book, and it was properly held that it is only where separate books are kept that parties can be led astray by an improper registry. In the case at bar it is shown that separate books were kept in the office, but for several years the recorder of the parish failed to make any registry or inscription in the book of conventional mortgages, and the plaintiff, Verges, was misled as to the alleged registry of Bergeron's mortgage, for before taking his mortgage he employed counsel to examine the records, who did so and obtained a certificate from the recorder that no mortgage upon the property existed at the time, except one in favor of the said Verges, which was recognized and included in the one which was enforced in this proceeding.

The law required that if the act contain a conveyance of real estate without a mortgage, it should be recorded in a book of conveyances; if it contain a conveyance of real estate, together with a mortgage, it should be recorded *both* in said book of conveyances and in a book of

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Verges v. Prejean & Bernard. Haydel v. Mrs. C. Keller—Bergeron, Opponent.

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conventional mortgages. Bergeron's act contained a sale of real estate together with a mortgage, and was recorded in the book of conveyances, but not in the book of conventional mortgages, *then in the recorder's office*. Hence his mortgage had no effect against third persons. 21 An. 427; Acts of 1855, page 407, sections 13 and 14, page 335, sections 1 and 2; C. C. 3314, 3332.

It is therefore ordered that the judgment appealed from be reversed and that there be judgment in favor of plaintiff, H. Verges, decreeing him entitled to the proceeds of the sale of September 7, 1867, in satisfaction of his judgment with mortgage against defendants, Prejean & Bernard, with costs in both courts.

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No. 3254.—ALCESTE GAIENNIE, Administrator, v. Widow GERVAIS GAIENNIE—DEPOORTER and WILDERSEN, Third Opponents.

The fact that a sale of succession property has not been recorded does not affect the title as between the vendor, the succession, and the vendee, the purchaser. In such a case if the vendee places a mortgage on the property after he has purchased it, the holder of such mortgage may cause the property to be seized and sold in satisfaction thereof, and the title of the purchaser to the property mortgaged will not be defective because the act of sale from the succession to the mortgageor was not recorded before the mortgage was given.

**A**PPEAL from the Fourth Judicial District Court, parish of St. James. Beauvais, J. Charles Louque, for plaintiff and appellant. Legendre & Poche, for third opponents and appellees.

TALIAFERRO, J. The plaintiff, representing himself to be the administrator of the succession of Gervais Gaiennie, deceased, obtained an order of seizure and sale of a tract of land lying in the parish of St. James, alleged by him to be mortgaged to the succession by the widow of decedent, who, as it appears, purchased it at the probate sale of the succession. As evidence of the widow's indebtedness, three several promissory notes were presented, each note for the sum of \$19,717 82, with eight per cent. interest from their respective maturities. The opponents applied for and obtained an injunction to restrain the sheriff from selling the property, alleging themselves to be just owners of it, and declared that it was purchased at a sheriff's sale as property of the Widow Gaiennie, who mortgaged it to Laiche to secure a loan of money obtained from him, and under whose mortgage it was sold.

There was judgment in the court below annulling the act under which the plaintiff had obtained the order of seizure and sale, and decreeing in favor of the opponents. From this judgment the plaintiff appeals.

The facts appear to be that Gervais Gaiennie died in the parish of St. James in 1854, leaving several heirs, issue of his marriage with his

surviving widow, Nathalie Chenet, the defendant in this case. The property all belonged to the community. Alceste Gaiennie, a son and heir of the decedent, and who is the present plaintiff, became administrator of the estate. An order of court was obtained for the sale of all the property of the succession, in order to effect a partition. The entire property, land, slaves and personal property, was purchased by Mrs. Gaiennie, the widow, at the price of \$100,000. In August, 1859, the administrator filed in court his final account. Pursuant to the decree of partition, he reduced the assets to cash by deducting eight per cent. per annum from the credit installments, making the whole amount \$88,000. The debts amounted to \$40,846, and were paid with funds received from the widow. The administrator gave one-half of the remainder to the widow in her own right, and the other half, accruing to the heirs, he paid over to Mrs. Gaiennie as usufructuary. On the third of December, 1859, the account of administration was approved and homologated. At this date it seems all the heirs were of age except two. On the thirtieth of March, 1859, Mrs. Gaiennie negotiated a loan of money with Pierre Laiche to the amount of \$14,389, to secure the payment of which she mortgaged the property she purchased at the succession sale of her husband. The property was then subject to no prior mortgages except one to the Citizens' Bank to secure stock notes, and the tacit mortgage in favor of the two minors, Nathalie and François Gaiennie. The mortgage to Laiche was recorded on the same day it was executed, and was reinscribed on the thirtieth of March, 1865. On the twenty-ninth of July, 1865, the *proces verbal* of sale by the administrator made on the twenty-third of November, 1858, which had not previously been recorded in the recorder's office, was registered in the mortgage book, and on the same day Mrs. Gaiennie, by authentic act, granted a special mortgage on the same property in favor of her children, all of whom were then of age, to secure them in the sum of \$23,760, being their share in the succession of their father, of which she reserved her usufruct.

On the twenty-third of January, 1867, Laiche foreclosed his mortgage and the property mortgaged was sold, and DePoorter, one of the third opponents, became the purchaser at the price of \$25,000. He paid \$3065 84, the amount owing to François Gaiennie, assumed the Citizens' Bank mortgage, paid the balance owing to Laiche, and retained the balance, \$9660 77, on account of one of the notes secured by the mortgage to Laiche, the purchaser being the holder of the note. Soon after this sale, DePoorter sold an undivided half of the Gaiennie plantation to Wildersen, the joint owners being in peaceable possession of the property until disturbed by the executory process taken out by the plaintiff in this case.

On the twenty-fifth of August, 1870, the plaintiff, in an act before a

notary, in which he assumed the character of administrator of the succession of Gervais Gaiennie, declared that the Widow Gaiennie had not complied with the terms of the sale of the property of Gaiennie's succession made in November, 1853, and in consequence thereof he had not been able to pass a regular act of sale to the purchaser, and proceeded then, in the act of 1870, to sell to Widow Gaiennie the property of the succession, consisting of the land, thirty-eight slaves, and all the personal property, for \$100,000, in part payment of which Mrs. Gaiennie executed three notes, each for the sum of \$19,717, dated November 23, 1858, payable in one, two and three years after date, and mortgaged the property purchased to secure their payment. In September, 1870, the plaintiff seized, under executory process, the property in possession of the opponents, and they enjoined the sale.

The course pursued in this case by the plaintiff and defendant seems anomalous and unsustained by law. It is argued on behalf of the plaintiff, claiming still to be administrator of the estate of Gervais Gaiennie, that as the act of sale of the succession property was not recorded until the twenty-ninth of July, 1865, it was utterly null as to the opponents, and therefore, being unrecorded prior to that time, the mortgagee, Laiche, acquired no right by the mortgage executed in his favor by Widow Gaiennie on the thirtieth of March, 1859, and consequently under the foreclosure of Laiche's mortgage and the sale under it, the opponents acquired no title. We do not assent to this reasoning as being sound. The unrecorded act could not affect any of the rights of third parties, but that operated no disability in Mrs. Gaiennie to sell or to mortgage the property, and none in the mortgagee to accept a mortgage from her. Her title was perfect as between herself and the succession. The title of the estate was divested, and it was vested in her. Being owner, she could sell or mortgage the property. Her abstract right in it was not affected by the omission to record; that omission related only to the effect of her title as to third parties.

The proceedings in relation to the estate of Gervais Gaiennie seem to have been conducted regularly and with precision. The *proces verbal* of the sale contains everything necessary to constitute it a proper act of conveyance. No subsequent deed of sale by the administrator or the heirs was necessary to its validity. The interposition of neither was required by the order or terms of the sale to render the *proces verbal* a valid act of transfer. The pretense of the plaintiff, in August, 1870, more than ten years after his final account of administration of the estate of Gaiennie had been duly approved and homologated by the proper court, that he had not made a title to the purchaser, is entitled to no consideration. The exception *plene ministravit* was well taken by the opponents. The functions of the administrator had long previous to August, 1870, been fully exercised. All was done that was

Gaiennie, Administrator, v. Widow Gervais Gaiennie.

required to be done by an administrator. The property had been sold, the debts all paid, the partition ordered by the court had been completed, and the estate distributed between the heirs and the widow according to their respective shares. The administrator had presented the final account of his administration, and which, not being opposed after due notice, was confirmed by a final order of the court. It was altogether an uncalled for act his going before a notary on the twenty-fifth of August, 1870, and executing a deed of sale in favor of Mrs. Gaiennie of a tract of land embracing the plantation that had belonged to the succession of Gervais Gaiennie, and with it thirty-eight slaves, taking notes dated twenty-third of November, 1858, and made payable in one, two and three years from date, secured by mortgage and privilege on the property sold. This act the lower court properly decided to be null and void. The plea of prescription set up by the opponents against the notes, it becomes unnecessary to consider.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

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No. 3673.—PAUL LEFEVRE v. MISS ESTELLE LANDRY—J. A. LANDRY, Garnishee.

A judgment creditor can not maintain a garnishment process, or seize by attachment, the rights and credits of the debtor, until he has obtained judgment on his demand, unless he shows that a fraudulent or simulated transfer has been made by the debtor of his property before the attachment was levied. C. P. 240.

**A**PPEAL from the Fourth Judicial District Court, parish of Ascension. *Beauvais, J. R. N. Simes*, for plaintiff and appellant. *Duffel, Nichols & Pugh*, for defendant and appellee.

LUDELING, C. J. The plaintiff sued the defendant on a stated account, and alleged that she had made a simulated transfer of all her property to J. A. Landry, with the purpose of defrauding her creditors, and he prayed for a writ of attachment, and that J. A. Landry be garnisheed.

There was judgment in favor of the plaintiff for the amount of his claim and dismissing the attachment, and he has appealed.

It is admitted that the plaintiff has failed to prove that the transfer from defendant to J. A. Landry was fraudulent. It follows as a matter of course, therefore, that the attachment, which was based on the supposition that the transfer had been fraudulent or simulated, must fall—*"sublato fundamento cadit opus."* Hence the plaintiff could neither attach nor seize otherwise any right of defendant before he had a judgment. C. P., art. 240, No. 4.

It is therefore ordered and adjudged that the judgment of the district court be affirmed, with costs of appeal.



## No. 3721.—SAMUEL DICKSON v. THE SUCCESSIONS OF JOHN and AMELIA COMPTON.

An executor can not bind the estate he represents by the acknowledgment of a debt which is already prescribed, nor can he bind the estate by giving a new note in the place of one already prescribed.

**A**PPEAL from the Ninth Judicial District Court, parish of Rapides. *Osborn, J. James G. White*, for plaintiff and appellee. *Thomas C. Manning*, for defendants and appellants.

**TALIAFERRO, J.** The plaintiff sues a number of persons, whom he alleges are the heirs and legal representatives of John and Amelia Compton, deceased, on a promissory note executed in his favor by L. G. Compton, in his capacity of executor of the successions of his father and mother, and upon an account for work and labor done by him as a brick mason on the two plantations belonging to those successions. The note sued upon is dated October 15, 1867; is made payable twelve months after date; is for the sum of \$1789 75, bearing eight per cent. interest from date, and expresses that it was for brick work done on the plantations. L. G. Compton, the executor who gave this note, died, it seems, early in 1868, and no dative testamentary executor or other representative of these successions has since been appointed. The open account sued on is for \$461, for work and labor done during the years 1866, 1867 and 1868.

The answer is a general denial. The prescription of three years is pleaded to the open account, and they deny any liability on the note sued upon. They aver that it was given by the executor, L. G. Compton, in renewal of a previous note, which was prescribed at the time the note sued on was given. The plaintiff had judgment in his favor on the note, but his demand on the account was rejected as being prescribed. The plaintiff appears to have acquiesced in the judgment, as he has not appealed from it. The defendants have appealed.

The defense seems to be made out. John Compton, it seems, died in 1855, and his wife, Amelia, in 1857. Their son, L. G. Compton, appears to have carried on both plantations in his capacity of executor until the time of his death in 1868. The note in question was given by the executor ten years or more after the death of his ancestors. The plaintiff, by his own testimony, states the facts in regard to the taking up of the original note by the executor, as follows: "The old note was signed the same as the one sued on, and was given just before the war, and was for about \$4000. I knocked off a good deal, say between \$800 and \$1000. At the date of the last note I bought some sugar cane for Branch Tanner from L. G. Compton, about \$2250 worth; that amount was placed on credit on the old note, and the note sued was given for balance due me. No other credit was on the old note except the sugar cane."

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Dickson v. Successions of John and Amelia Compton.

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It is a matter of historical notoriety that the war commenced in the early part of the year 1861. The old note, then, must have been given in 1860 or early in 1861, and it was prescribed at the date of the new note, the one sued on.

It has been frequently decided that an executor or administrator is without power to bind an estate by acknowledging a debt against an estate already prescribed, and in the case of *Lafon's Heirs v. His Executors*, it was held that executors can not even by payment, if unauthorized by the proper court, deprive creditors, legatees and heirs of the protection of an acquired prescription. 3 N. S. 716. See also 12 Rob. 16; 21 An. 373; 22 An. 445.

It is therefore ordered, adjudged and decreed that the judgment of the district court, so far as it sustained the plea of prescription plead against the account sued on, be affirmed; but in regard to the note, that its decree be annulled, avoided and reversed. It is further ordered and adjudged that there be judgment in favor of the defendants, the plaintiff and appellee paying costs in both courts.

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No. 2461.—*R. H. NOBLE v. LOUIS TROST and HENRY WEBER.*

Plaintiff sued defendants as partners in the building business for damages resulting from the failure on their part to comply with their contract in erecting a building. The evidence showed that the defendants were not partners at the time the contract was made, and the contract was made with only one of the defendants. Held—That the defendants not being partners at the time the contract was made, the plaintiff could not recover from the partnership the damages resulting from its violation.

**A** PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Bentinck Egan*, for plaintiff and appellant. *J. Dirhammer*, for defendants and appellees.

WYLY, J. The plaintiff sues the defendants as partners in the carpenter business for \$4257 87, the amount which he alleges it cost him to complete a certain building they had contracted to erect for him, but abandoned it before completing the contract. The court gave judgment against the defendant, Trost, for the amount claimed, but rejected plaintiff's demand against the defendant, Weber. From this judgment the plaintiff appeals.

The question is, was Weber a partner of the defendant, Trost, at the time the latter entered into the contract with the plaintiff to build the house?

The contract was made with Trost alone in a notarial act; the plaintiff did not contract with him as the partner of Weber, because it is shown he was not aware of it at the time. According to the testimony of Trost, the defendant, the principal witness for the plaintiff, Weber was only a dormant partner. And although this witness deposes that Weber was his partner at the time he contracted to build

the house for the plaintiff on the twenty-ninth day of October, 1866, he swore in the case of *George Merz v. Trost & Weber*, as appears by his deposition in that case, received as evidence in this, that his partnership with Weber began in the latter part of April, 1866, and ended "in the latter part of September, 1866," and this declaration he repeated several times in his deposition in that case. This was nearly a month before the contract was made with the plaintiff.

The defendant, Weber, testified that he was not the partner of Trost, and his statement is corroborated by other evidence in the record.

There is, however, a mass of evidence which is contradictory and unsatisfactory; but after carefully examining it, we have come to the conclusion that the judge *a quo* did not err in deciding in favor of the defendant, Weber, his liability not being established, because it is not sufficiently shown that he was a partner of Trost, as alleged. If he had been a partner, the partnership was dissolved, as we believe from the evidence, before the consummation of the contract upon which this suit is founded. If the defendant, Weber, had been a partner, he was only a dormant partner, and no notice of the dissolution of the partnership was necessary in order to escape liability to the plaintiff, because it is shown that the latter contracted with Trost without a knowledge of said partnership. Story on Partnership, 255, sec. 159; Smith's Mercantile Law, 87, 88; 10 R. 444; 5 An. 167.

It is therefore ordered that the judgment herein be affirmed, with costs.

Rehearing refused.

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No. 3554.—*H. FORBES, Wife of George Warner, v. V. C. BURKE et al. D. R. CARROLL, Intervenor.*

After a succession has been partitioned among the heirs, and the portions allotted to each one of the heirs has been set apart to them, the share of one of the heirs can not be pledged, because it can not be delivered.

A written instrument in favor of a creditor signed by one of the heirs, acknowledging her indebtedness and transferring her interest to the creditor, has no legal effect, because there was no fixed price, nor an extinguishment of the debt, it being neither a sale nor a payment of the debt.

**A**PPEAL from the Second District Court, parish of Orleans. *Duwig-neaud, J. Hays & New* and *R. Shackleford*, for appellants. *D. C. Labatt*, for appellees.

HOWELL, J. After judgment was rendered herein in February, 1871, recognizing the heirs of John and Mary Alexander, fixing their respective portions, and ordering the sale of the property to effect a partition, and after the sale had been made, D. R. Carroll intervened, claiming the portion allotted to Lina Mary Quirk, one of said heirs, by virtue of the following instrument:

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H. Forbes, Wife of George Warner, v. Burke et al.—Carroll, Intervenor.

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“NEW ORLEANS, first November, 1861.

Being indebted to D. R. Carroll & Co. in a sum exceeding three thousand dollars, and being desirous to secure to them whatever I may owe them upon a settlement of accounts, I hereby transfer, sell and assign to them all my right, title and interest in and to the succession of Mary Ann Williamson Alexander, of which succession I am an heir, having inherited from my child, who was the grandchild of the said Mrs. Alexander, and who died subsequent to her and her mother.

(Signed)

D. V. QUIRK.”

In connection with this, J. G. McLearn, one of the firm of D. R. Carroll & Co., testified that said Quirk being indebted to his firm, they requested him, to give them some security or relieve them from his indebtedness, and that the above transfer was given as a security to pay them what he owed them. Such was the object of it, Quirk hoping that something would be realized out of it.

There being no fixed price nor an extinguishment of the debt, there was neither a sale nor a giving in payment. And as a succession right can not be pledged, because a delivery can not be made (3 L. 156), the above instrument was without any effect. The *ex parte* order of the court based on it could not give it force as against those not parties to the suit.

It is therefore ordered that the judgment appealed from be affirmed, with costs.

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No. 3619.—LOUISIANA STATE LOTTERY COMPANY v. CITY OF NEW ORLEANS.

The Legislature has the power under the Constitution to commute the taxes imposed on a corporation created by it, and thereby to relieve it from the payment of all other licenses or taxes by the State itself or by any municipality created and authorized by the Legislature to levy a license or tax on such corporation. The exemption of the Lottery Company, in its charter, from the payment of all other taxes and licenses, on its payment annually into the State treasury a certain amount for the benefit of the school fund, is not therefore in conflict with article 118 of the Constitution, which requires that taxation shall be equal and uniform throughout the State.

The doctrine announced in the case of the State Lottery Company v. A. Richoux et al., 23 An. page 743, deciding that the title to the act creating the Lottery Company was not in conflict with article 114 of the Constitution, which requires that the objects of every act must be expressed in its title, is reaffirmed by this decision, and it is again held that the title of said act sufficiently expresses its objects.

**A** PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. Joseph P. Horner*, for plaintiff and appellee. *Rufus Waples*, for city of New Orleans, appellant.

**TALIAFERRO, J.** The plaintiff obtained an injunction against the city and Police Board, complaining that the city by its agents and officials, and the Board of Metropolitan Police by its officers, were annoying the lottery company by persistently calling upon them and

their agents, demanding to see the licenses granted to them by the city, and that certain members of the police force of the Board of Metropolitan Police had illegally arrested two of the company's agents and closed their places of business, on the alleged ground that they had not taken out licenses from the city for carrying on their business. The plaintiff charges that by the president of the company the law exempting it from the payment of all municipal taxes and licenses were exhibited to the recorder who issued the warrants of arrest, and a release unconditionally of the persons arrested was demanded, but which was refused unless under bail.

The Board of Metropolitan Police answered by general denial. The answer of the city denies the exemption by law of the lottery company from the payment of any taxes and licenses to the city, and makes the points:

*First*—That the act of the Legislature under which the company sets up the immunity it claims, is unconstitutional and null, for the reason that the purpose and object of the act is not expressed by its title, as required by the Constitution of the State, article 114.

*Second*—That the act is violative of article 118 of the State Constitution, because it infringes the principle of equality and uniformity in the matter of imposing taxes, the plaintiff paying a fixed sum annually to the school fund, and paying nothing for the other purposes of government; that the Legislature under the Constitution is inhibited from exempting from taxation any species of property except such as is actually used for charitable, educational or religious purposes.

*Third*—That the act is in violation of article 2 of the State Constitution, for the reason that it grants certain rights to the plaintiff which are denied to other citizens of the State.

The city sets up a reconventional demand of \$2500 against the plaintiff, alleged to be owing and due by the company for city licenses for the vending of lottery tickets.

There was judgment in favor of the plaintiff perpetuating the injunction, and the city has taken this appeal.

In relation to the first ground taken in defense, we had occasion recently to determine that the title of the act No. 25 of the session of 1863, entitled "An act to increase the revenues of the State, and to authorize the incorporation and establishment of the Louisiana Lottery Company, and to repeal certain acts now in force," is sufficiently expressive of the objects of the act. 23 An., page 743, *Louisiana State Lottery Company v. A. Richoux et al.*

Where the general scope and purpose of the legislator is apparent, and the objects embraced in a legislative act are indicated by its title in terms that convey to the mind the character of the act and the ends aimed at in establishing it, there is a sufficient compliance with the

provisions of article 114 of the Constitution. To require the objects of an act to be fully and succinctly declared in its title, would be to require its title to contain all that the act itself contained, an inconvenience incompatible with practical law making. If such a requirement were enforced, but few of the laws in our statute books could be held valid.

To the second ground of defense, that the act is in derogation of the equality and uniformity required in levying taxes, it may be said that the power of a State Legislature to impose what is known as a commutation tax, is a well recognized power, not only in our own jurisprudence, but generally. 11 An. 733; 9 Wallace 50; 17 Illinois 291; 30 Indiana 146. In the act under consideration, the Legislature has deemed it advisable to grant to the lottery company an exemption from all other taxation, except that of paying \$40,000 per annum to the State for public education. On the commutation principle, we think the act is not violative of the Constitution. It is not clear that the city has any ground to object to this exemption by the State of the company it claims the right to require the payment of licenses from, the city being a municipal corporation and deriving its right to levy licenses from the State, and in this instance the right is withheld.

For these reasons we think the third ground taken in defense, as well as the reconventional demand set up by the defendant, are untenable.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

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HOWELL, J., *concurring*. I concur in the conclusion in this case, on the grounds that the majority of this court have heretofore declared the title in question constitutional, and the city has no interest in raising the question as to the uniformity of taxation. The tax in this case is simply the price for a license to carry on the business of the corporation, and the act of incorporation expressly exempts it from "all other *licenses* of any kind whatever, whether from State, parish or municipal authorities." This takes from the city the power which it had under the general authority to levy license taxes, to impose a license tax on this company. Whether this can dispense with the necessity to obtain a license from the State, and whether the Legislature can commute taxes under the terms of article 118 of the Constitution of 1868, are questions upon which I think it unnecessary to express an opinion in this case.

Mr. Justice Howe concurs in the above opinion.

## No. 2426.—JOHN FALCONER v. KATE G. STAPLETON.

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The authorization by the judge of a married woman to borrow money and mortgage her separate property therefor, under the provisions of the act of fifteenth of March, 1855, must be given before the debt is contracted or the mortgage is given.

**A** PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. W. B. Koonz and John F. Elliott*, for plaintiff. *L. E. Simonds*, for defendant and appellee.

**TALIAFERRO, J.** The plaintiff appeals from the judgment perpetuating the injunction sued out by the defendant, a married woman, to restrain the executory process obtained by the former on the mortgage note of the latter for \$10,000.

The defendant, in her petition for injunction, alleges that she is a married woman, the wife of Edward Stapleton; that there was no consideration for the mortgage sought to be enforced against her property; that plaintiff did not, in fact, loan or furnish her any money; and that if any debt was due the plaintiff at the time of executing the mortgage, it was due by her husband and not by her.

The testimony of the defendant, who was a witness in the case, fully sustains her allegations, and the plaintiff offered no evidence to contradict it.

But the plaintiff contends that the mortgage was executed with the authorization of the judge in conformity with the act of the fifteenth March, 1855, and it need not be shown that the debt secured by the mortgage inured to the benefit of the defendant.

It is not stated in the act of mortgage that the defendant was authorized by the judge, under the statute referred to, to contract the debt.

The debt was contracted and the mortgage executed on the sixteenth of November, 1866. On the seventeenth of November, 1866, the judge gave his certificate, authorizing the defendant to borrow \$10,000, and, "with the authorization of her husband, to hypothecate or mortgage her separate property for the purpose of borrowing said sum of ten thousand dollars."

The issue is correctly stated in the brief of the defendant's counsel. It is: When the defendant executed the mortgage had she the required authorization of the judge? Did the plaintiff lend the defendant ten thousand dollars, or any other sum, after the judge's authorization to contract the debt? From the evidence we are constrained to answer both of these propositions in the negative.

The validity of the mortgage of the sixteenth of November, 1866, depends upon the authority of the defendant at the time to contract the debt. It can not be strengthened by the authority of the judge, given on the seventeenth of November, 1866. He authorized a debt to be contracted. The one already contracted was not authorized by the judge in pursuance of the act of 1855.

But the plaintiff contends that this difference in the date of the act of mortgage and the certificate of the authorization of the judge is a mere clerical error. This statement contradicts the plaintiff's admission in the record. He admitted on the trial that the mortgage he seeks to enforce was executed on the sixteenth of November, 1866, and that the judge's authorization was given on the seventeenth of the same month. The fact is also shown by other evidence.

Having failed to show that the debt inured to the benefit of the defendant, and the evidence showing otherwise, the plaintiff ought not to recover, the mortgage not having been executed with the authorization of the judge in conformity with act fifteenth of March, 1855.

Judgment affirmed.

Rehearing refused.

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No. 2422.—OBER, NANSON & Co. v. WILLIAM MATTHEWS—GEORGE R. ROBINSON, Intervenor.

In an attachment suit, additional interrogatories may be propounded to the garnishee, after the first interrogatories have been answered, without going through the formalities of traversing the answers to the first interrogatories.

The burden falls upon the intervenor in an attachment suit, who asserts ownership of the chattel attached, of showing a complete title in himself before the attachment.

An order given on the holder of a bill of exchange by the owner or agent to deliver it to a third person, will not enable such third person to defeat the rights of an attaching creditor, who has levied an attachment on the bill as the property of his debtor.

A bill of exchange or promissory note found in the State of Louisiana, may be attached by the creditor of its owner, although the contract out of which it originated was made in the State of Missouri between parties residing there at the time.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. R. & H. Marr*, for plaintiffs and appellees. *J. N. Brickell*, for intervenor and appellant.

LUDELING, C. J. The plaintiffs brought suit by attachment against William Matthews, on the thirteenth of February, 1867, to recover a balance of \$50,000, due on account, and on the same day Garrard & Craig were cited to answer interrogatories as garnishees. On the twenty-third day of February a supplemental petition was filed, and the Southern Bank was garnisheed.

On the second of March, 1867, the Southern Bank answered that it held for collection, for account of the Exchange Bank of St. Louis, a bill of exchange, drawn by Matthews on Garrard & Craig, and accepted by them, dated fourth February, 1867, at sixty days, for \$13,000. On the day on which the answers of the Southern Bank were made, the plaintiffs filed a supplemental petition, alleging substantially that the bank had inadvertently fallen into an error in saying that the bill was held for account of the Exchange Bank of St. Louis, and wishing to give the bank an opportunity to correct the error, rather than to formally traverse the answers (reserving, however, the right to do so



should it become necessary), and they propounded additional interrogatories to said bank. On the ninth of March, 1867, the Southern Bank answered again, saying that since the first answers were made, the bank had received letters from the Exchange Bank, which showed that said bank had no further interest in the bill. The letters are made part of the answers, and they are as follows :

“ST. LOUIS, February 22, 1867.

Thomas Layton, Esq., President:

*Dear Sir*—On the twentieth instant I gave Mr. Matthews an order for Garrard & Craig's acceptance, \$13,000, due eighth April, but omitted to request the erasure of our indorsement. Please have it erased, and oblige.

Yours, very respectfully,

H. H. VERUSE, Cashier.”

“ST. LOUIS, February 27, 1867.

\* \* \* I am in receipt of your telegram of twenty-sixth, giving notice of attachment of Matthews' drafts.

Messrs. Ober, Atwater & Co. have been to-day ordered to release all but one, (\$13,000) thirteen thousand dollars, maturing April 8, and I presume they will have done so ere this reaches you. That draft, I presume, is under attachment; at all events this bank has no interest in it, we having received payment of it on the twentieth instant, and given an order for it.

Yours, truly,

ROBERT E. CARR, President.”

On the first of May, 1867, George R. Robinson intervened in the suit, claiming to be the owner of the bill of exchange.

There was judgment in favor of the plaintiffs, and the intervenor has appealed.

The facts disclosed by the record are that William Matthews drew the bill in question to his own order, and indorsed it in blank, on fourth February, 1867. On the same day the Exchange Bank discounted the bill and gave Matthews the proceeds. The Exchange Bank indorsed it to T. Layton, who was the president of the Southern Bank, and remitted it to the said bank for collection. On the twentieth of February, 1867, an arrangement was made between Matthews and the Exchange Bank, by which Matthews became the owner of the bill, and he obtained an order on the Southern Bank to deliver the bill to his order. On the twenty-third day of February, Matthews applied to the Exchange Bank to discount the bill a second time, which the bank refused to do. Matthews then induced the bank to give him another order, in lieu of the one first given, on the Southern Bank for the bill. This second order differed from the first in leaving a blank for the name of the person to whom the Southern Bank was to deliver the bill, and in being signed by the president instead of the cashier.

After this, and on the same day, the negotiations which had been going on between Matthews and Robinson about the bill were closed, and Matthews gave him the order of the Exchange Bank on the Southern Bank for the delivery of the bill.

The intervenor insists that the attachment in the hands of the bank, made on the twenty-third day of February, fell, inasmuch as the bank, in its answers to interrogatories, negatived the idea that it held any property belonging to the defendant on the day the interrogatories were served, and the plaintiffs had not traversed the answers, and that the plaintiffs could not amend their proceedings by propounding more searching questions and drawing out information which had subsequently reached the garnishee. The additional interrogatories propounded to the bank were, in effect, a mode of traversing the first answers, made in ignorance of the real facts.

Whether or not the plaintiffs attached any property of the defendant, must depend upon the fact whether the bank had or had not property belonging to him at the date of the service of the interrogatories. And we can conceive of no good reason why the inaccuracies and errors in the answers of the garnishee may not be shown by additional interrogatories put to himself, as well as by the testimony of other witnesses or by written evidence. C. P. 262; 17 An. 258, Relf & Co. v. Boro.

The intervenor contends also that the attachment must be set aside, as the evidence shows that on the twenty-third of February, the day on which the attachment was levied, he had acquired the rights of Mr. Matthews in and to the bill of exchange, and the evidence does not show that the attachment was levied before the transfer to him. We think the *onus* of proof is on the intervenor, who asserts his ownership. It is not sufficient for him to show that Mr. Matthews transferred to him the bill, but he must show that his ownership was complete before the attachment. This he has not done, even if it be conceded that the agreement between himself and Matthews, and the delivery of the order for the bill in Missouri, where they both resided, divested the title of Matthews, as to creditors of Matthews. But the agreement between Matthews and Robinson, and the delivery of the order for the bill, which was in the possession of the Southern Bank in Louisiana, did not divest the title of Matthews to said bill, as to the creditors of Matthews.

By our laws the sale of personal property is perfected by the mere consent of the parties, as between themselves, but it is not perfected as to third parties until delivery. C. C., art. 1922, 1923. And it has been held by this court that "a promissory note, not transferred by indorsement and delivery in the usual mercantile mode, but by a collateral agreement, is subject to the same rule." *Lassiter v. Bussey*, 14

Ober, Nanson & Co. v. Matthews—Robinson, Intervenor.

An. 699, and *Hill v. Hanney & Co.*, 15 An. 654. An order for a note is not a delivery thereof, and the creditor of the transferrer may attach the thing sold before delivery. 4 M. 20, *Norris v. Mumford*; 3 M. 222, *Durnford v. Brooks' Syndics*.

But it is contended that the effect of the contract between Matthews and Robinson, made in Missouri, where both parties resided, must be controlled by the laws of Missouri, as personal property has no *situs*, except that of the owner. As to the attaching creditors, the contrary seems to be the well settled jurisprudence of this State, as well as of the Supreme Court of the United States. 2 N. S. 93, *Olivier v. Townes*; 7 M. 318, *Thuret et al. v. Jenkins*; 17 La. 539, *Burne v. Patton*; 8 R. 262; *United States v. U. S. Bank*; 5 Wallace 510; 7 Wal. 145.

It is therefore ordered and adjudged that the judgment of the district court be affirmed, with costs of appeal.

No. 3668.—*F. G. OFFUT v. A. J. ACHEVERRA*, President of the Board of School Directors, parish of Assumption.

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A board of school directors of a parish can not be compelled by judicial proceedings to make a different disposition of the funds entrusted to their care than that provided by law. Where, therefore, the law has made provision for the settlement of outstanding claims against the school fund, which bear date prior to the appointment of the school board, a suit can not be entertained against the president or board of directors to compel its payment out of the school funds in their hands, the disposition of which has been regulated by law.

**A** PPEAL from the Fifteenth Judicial District Court, parish of Assumption. *Beatie, J. Nichols & Folse*, for plaintiff and appellee. *Hiram H. Carver*, for defendants and appellants.

WILY, J. The defendant appeals from the judgment recovered by the plaintiff against him for \$952 78 on a warrant drawn by the school directors of the eighteenth public school district, parish of Assumption, on the parish treasurer, dated thirty-first December, 1865.

We do not see any cause of action against the defendant. He never employed the plaintiff to teach the public school he claims to have taught in the parish of Assumption in the years 1862, 1863 and 1864, for which the warrant was given, and the corporation of which he is president was not then in existence. Nor is it the successor of the school board which existed in that parish prior to the Constitution of 1868. It is well settled that the powers of corporations of this character extend no further than the provisions of the act creating them. Act No. 6, approved sixteenth of March, 1870, and act No. 8, approved twenty-fifth of February, 1871, which created the present public school system, will be searched in vain to find any authority conferred on the defendant to settle claims of the kind declared on by the plaintiff. It is made no part of his duty to pay the outstanding liabilities

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*Offut v. Acheverra, President of the Board of School Directors, parish of Assumption.*

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of former school directors, or any claims held by teachers prior to the acts of 1870 and 1871. On the contrary, the law in express terms provides that all such claims "shall be examined by the State Board of Public Education and referred by them to the next General Assembly." Section 31, Act No. 6 of extra session of 1870.

We can find in the record nothing to authorize judgment against the defendant, the president of the board of school directors of the parish of Assumption. Because the plaintiff ought to have a legal remedy to the legal obligation which he claims to exist in his behalf, is no reason why he should enforce it against the defendant, a stranger thereto, and who is no more liable than other persons in the parish of Assumption. The school board ought not to be compelled to apply the money confided to it to any other purpose than that directed by law, and this court will not require it to be done.

Let the judgment appealed from be annulled, and let the plaintiff's demand be rejected, with costs of both courts.

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No. 2459.—*P. HALPIN and J. A. MORAN v. T. L. MAXWELL, Sheriff, et al.*

The appeal will be dismissed if the amount claimed in the court below does not exceed five hundred dollars.

Where a discrepancy occurs between the amount demanded in the petition, and the amount as shown to be claimed by documents filed with and made a part of the petition, the latter will govern as to the sum demanded. If, therefore, the amount claimed by the documents filed be less than five hundred dollars, the appeal will be dismissed, although the amount claimed in the petition be above that sum.

**A**PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. T. A. Bartlette*, for plaintiffs and appellees. *Clarke, Bayne & Renshaw and Breaux & Fenner*, for defendants and appellants.

HOWELL, J. We are unable, under the plain terms of the Constitution, to take jurisdiction of this case, although we have already refused a motion to dismiss. The gravamen of the action is that, by the unlawful acts of the sheriff and Carl Kohn, defendants, the plaintiffs have been deprived of the use of their premises, corner of Julia and Basin streets, from the first of September, 1868, to the first of December, 1868, the value of the use of which is \$125 a month, which, it is stated in the petition, makes a total of \$500, and judgment is asked for this sum, with interest from first of December, 1868. It is evident, however, that this was an error of calculation or a fictitious amount, and in either case we are without jurisdiction. It is probable that in making the calculation the month of December was unwittingly included, and the amount fixed for four instead of three months. Every allegation descriptive of the claim and its origin, and every date connected with it, clearly and unmistakably limit it to the period from the

Halpin and Moran v. Maxwell, Sheriff, et al.

first of September to the first of December, same year, a term of only three months, at the price of \$125 per month. The two advertisements of the sale of the property in the premises are copied at length in the petition, and are referred to as showing the time during which plaintiffs were deprived of their property, and they show that time to be September, October and November, 1868. There is in another part of the long petition an allegation that they were deprived of their premises for "a term of four months," but it is followed by the words, "as appears by the annexed advertisement," which is then copied in the petition, and, in connection with the first advertisement, previously written out in full in the petition, shows the time to be a term of three instead of four months. It is well settled that when documents are annexed to and make part of a petition, they control if there is a discrepancy in dates and amounts. We find nothing in the record tending in the least to show that any greater amount than \$375 was or is claimed as the amount really due, except those manifest errors, which may or should be considered merely clerical and unintentional, it being apparent from the whole petition and record that plaintiffs did not really pretend to claim anything more than the rent for three months, at \$125 per month, of the premises in question.

It is therefore ordered that the appeal herein be dismissed.

No. 3642.—DAVID URQUIHART v. MRS. OCTAVIE BRINGIER THOMAS et al.

In a suit against a married woman, the plaintiff must show affirmatively, before he can recover, that the debt inured to the separate advantage of the wife. This must be shown whether the wife be separate in property from her husband or not.

If it be shown that a running account exists between the drawer of a draft and her commission merchant, then and in such case the drawer is entitled to notice of the dishonor and non-payment by the drawee, and if such notice be not given, then the drawer is not bound to the payee or holder of the bill, although it should be shown that the drawer had no funds in the hands of the drawee at the time it was drawn.

**A**PPEAL from the Fourth Judicial District Court, parish of Ascension. *Beauvais, J. Samuel R. & O. L. Walker*, for plaintiff and appellant. *Trist & Oliver*, for defendant and appellee.

WYLY, J. The plaintiff appeals from the judgment rejecting his demand against the defendant, Mrs. Thomas, a married woman, on two drafts for \$1000 each. There are several defenses urged, but we deem it necessary only to consider two of them, to wit:

*First*—The debt did not inure to the benefit of the defendant, Mrs. Thomas, who is a married woman and separate in property from her husband.

*Second*—There was no notice of the dishonor of the bills, nor anything equivalent thereto.

It is well settled that in a suit against a married woman, whether separate in property or not, the plaintiff, in order to recover, must

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Urquhart v. Mrs. Octavie Bringier Thomas et al.

show affirmatively that the debt inured to her separate benefit or advantage. This material fact has not been shown in this case. 5 An. 173; 7 An. 144; 3 L. 74; 5 An. 495; 1 An. 428; 7 N. S. 64.

The obligation of the drawer may become unconditional by showing that due notice of dishonor was given, or by showing that the drawer, having no funds or business transactions with the drawee, had no right to expect the bill to be paid. 11 R. 215; 19 L. 370, and authorities cited.

In this case, although the defendant, Mrs. Thomas, had no funds in the hands of the drawee, it is shown that she had a running account with him as her commission merchant. We think she had a right to expect her drafts to be paid, and therefore ought to have had notice of dishonor, which was not given.

Let the judgment herein be affirmed, with costs.

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No. 3376.—In the Matter of the Succession of JEAN CERISE.

The widow of her deceased husband, or her heirs, if left in necessitous circumstances, are entitled to recover one thousand dollars from his succession. In such a case, if it be shown that there are not sufficient funds in the estate, unencumbered by mortgage, to pay it, then the mortgages must contribute the balance.

**A** PPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. E. Bermudez*, for appellant. *J. Duvigneaud*, for appellee.

TALIAFERRO, J. A creditor of Jean Cerisé having a mortgage on his debtor's tract of land, proceeded to have it sold *via executiva*. The succession of Cerisé was small, consisting only of the tract of land sold after his decease by the creditor, and a few personal effects amounting by appraisement to \$115. The land brought \$2480, which was reduced to the net amount of \$1796, after deducting the expenses of sale and taxes against the land. The decedent left at his death a widow and minor children in necessitous circumstances. The widow, on behalf of her minor children, claims from the proceeds of the land \$1000 for their use and benefit, under what is termed the Homestead Law (Revised Statutes, section 1693). The creditor resists this claim on the ground that the widow and minors have in kind the personal effects of the succession and that they have had the use and enjoyment of the real estate, the rent of which was worth \$500.

We think the case was properly disposed of in the lower court, in which there was judgment rendered in favor of the minors for \$1000, less the sum of \$115, the appraised value of the personal property.

The creditor appealed. It is shown that the widow and minors are in necessitous circumstances and that there are no other means out of which the amount accorded to them can be paid.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

Rehearing refused.

## No. 2182.—UDOLPHO WOLFE v. BARNETT &amp; LION.

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The leading principle of the law of trade marks is, that the manufacturer or merchant who has produced or brought into market an article of use or consumption that has found favor with the public, and who, by affixing to it some name, device or symbol which serves to distinguish it as *his*, and to distinguish it from all others has furnished his individual guaranty of its value, shall receive the reward of his skill, and shall not be deprived thereof by infringement or imitation.

The words which compose a trade mark need not *each* be new. If the combination thereof be new and be descriptive of the origin of the goods and their ownership by the manufacturer who devises the mark, it will be unlawful for any other person to filch the combination or any important part thereof.

It is unlawful to put up imitation goods under the name of the real manufacturer, and the excuse that such an act was authorized by a person of the same name as that manufacturer, is absurd.

The fact that a trade mark label is copy-righted, but the date of entry is not given as required by the act of Congress, is of no importance in a suit in a State court for damages for imitation of a trade mark.

**A** PPEAL from the Fourth District Court, parish of Orleans. *Théard, J.*  
*Henry J. Leory and Semmes & Mott*, for plaintiff and appellant.  
*Hyams & Jonas*, for defendants and appellees.

This case was tried by a jury in the court below.

HOWE, J. The principal point involved in this case is one relating to the law of trade marks.

The plaintiff enjoined the defendants from preparing and selling or offering to sell any imitation of plaintiff's gin, or any article with or under the name or title of "Wolfe's Aromatic Schiedam Schnapps," or "Aromatic Schiedam Schnapps," or "Schiedam Schnapps," or from using any imitation of said name; and claimed damages for an alleged infringement by defendants of his rights as the manufacturer of this kind of gin and as the originator of the trade mark.

The defendants answered by general and various special denials.

The cause was tried by a jury, who rendered a verdict, the effect of which, as confirmed by the judgment of the lower court, was to restrain the defendants only from the use of the word "Wolfe," and to throw upon the plaintiff the costs of the suit, his claim for damages being rejected. The plaintiff has appealed.

It appears from testimony uncontradicted and unimpeached that the plaintiff manufactures his gin in Holland and puts it up in bottles with uniform and peculiar marks and labels; that he has been engaged in business of this kind since 1851; that the name "Wolfe's Schiedam Aromatic Schnapps," impressed on the bottles and forming part of the labels, was devised by him to denote his goods thus made and sold; that in the trade this name was fully recognized as his trade mark; that the phrase "Schiedam Schnapps" was fully recognized as his peculiar property, in that it expressed the origin and ownership of his goods, and suggested to the general public, who had occasion to buy gin, the liquor made, imported and bottled by him; that the liquor

thus put up was really gin; that it had certain medicinal qualities supposed by some to inhere in that kind of distilled spirits; and that it had been extensively advertised and sold by plaintiff. It appears, also, that the defendants had for some time been putting up and selling a gin adulterated with water in bottles similar in appearance to those of plaintiff, with labels which were merely colorable imitations of the name, mark, devices and symbols of plaintiff, being headed "Wolfe's Aromatic Schiedam Schnapps" and signed at the foot "Wolfe," instead of the "Udolpho Wolfe" of the genuine label, and with words blown on the sides of the bottles well calculated to mislead a purchaser who did not make an unusually careful scrutiny. It also appears, without any objection, that the defendants had imitated the goods of another manufacturer in a similar way and only desisted upon being threatened with suit.

It is not deemed necessary to review the numerous cases which have been cited in the able briefs of counsel. Some are conflicting. Some depends on technical differences between proceedings at law and in equity. In others the plaintiff's case was not made out by as full evidence as has been produced here. It is sufficient to say that in view of the facts above recited we think the plaintiff entitled to a perpetuation of the injunction originally issued and to damages, and not merely to the very limited relief accorded by the verdict.

It is urged by defendants that the plaintiff's claim is prescribed by the prescription of ten years, during which time, prior to the suit, they claim that they have been engaged in the business complained of. The prescription of one year, which is also pleaded, cuts off plaintiff from any claim for damages for any period longer than twelve months prior to citation, (Rev. C. C. 3536,) but we do not think there is any force in the plea of ten years, or in the further point "that the defendants have acquired as to all the world by uninterrupted possession for ten years a full and complete title to the trade mark."

It is further urged that the plaintiff is neither the discoverer nor first manufacturer of the article for which he claims the mark. We do not understand the current of authority to be in favor of this proposition that this is necessary to his case. In the passage cited by defendants from Upton on Trade Marks, page 24, that writer says:

"It seems to be the established doctrine that property in trade marks, so far at least as they consist in the proper name of the thing designated, or by long use have become known by that name, can exist only in those who have the exclusive right to manufacture or to sell the specific article, and so far as they consist in anything other than the proper name of the thing which is susceptible of becoming a legitimate trade mark, can exist only in the manufacturer or in those entitled to represent the manufacturer."



Assuming this statement to be accurate, it simply means that if the plaintiff's trade mark had consisted merely of the words "Holland Gin," it would be necessary for him to show an exclusive right to manufacture; but if the trade mark consists of something else, as the plaintiff's own name combined with a sonorous appellation well calculated to express origin and ownership as well as to attract the attention and impress the memory of buyers, it is only necessary that he should manufacture, without exclusive right, or represent a manufacturer. And we think the true rule, as applicable to this case, is correctly stated in the following passage from the same writer, page 97, to be this:

"That the honest, skillful and industrious manufacturer or enterprising merchant who has produced or brought into the market an article of use or consumption, that has found favor with the public, and who, by affixing to it some name, mark, device, or symbol, which serves to distinguish it *as his*, and to distinguish it from all others, has furnished his individual guaranty and assurance of the quality and integrity of the manufacture, shall receive the first reward of his honesty, skill, industry or enterprise; and shall in no manner and to no extent be deprived of the same by another, who to that end appropriates and applies to his productions the *same or a colorable* imitation of the *same name, mark, device or symbol*, so that the public are, or may be, deceived or misled into the purchase of the productions of the one, supposing them to be those of the *other*."

And see *Stokes v. Landgroff*, 17 Barbour 608; *Howard v. Henriques*, 3 Sandford 725; *Brooklyn White Lead Company v. Massuy*, 25 Barbour 416; *Williams v. Johnson*, 2 Bosworth 1.

It is in vain for defendants to urge that the several words which compose the name given by plaintiff to his goods are not new. His combination of these words is proved to have been new, and it is proved to indicate the origin and ownership of the liquor, and the defendants have no right to filch this combination, or any important part of it, in such way as to mislead the purchaser as to real origin and ownership. Upon this branch of the case the decision in *Gout v. Alesslogn*, 6 Beavan 69, is in point, where the defendants were restrained from using not merely the name of plaintiff, upon watches, but also any of the Turkish words and other devices first used by plaintiff to describe the merits of his watches. And see *Clark v. Clark*, 25 Barb. 76.

Still less can the defendants escape under the absurd excuse given in this testimony that they were putting up and selling the "imitation goods" under a written permit from a Mr. Wolfe, the father-in-law of one of them. It appears that this person died about four years before this action was begun, but, if he had lived, the use of his name under

this permit would only have made the defendants' attempt to deceive seem more deliberate and studied. *Croft v. Day*, 7 Beavan 84; *Rodgers v. Nowill*, 5 Man. Gr. and Scott 109. Nor is there any merit in the point that the plaintiff can not recover because his label, which contains the statement that it is copy-righted, does not also show the date at which the entry was made; nor in the point that he had no right, in any event to copy-right a label. This is not a suit to enjoin the infringement of a copy-right, the courts of the United States alone having jurisdiction of such cases. *Conkling*, 112. We presume the proof to show that in 1851 the plaintiff copy-righted his label in New York, was merely intended to show that he devised the label as early as that year.

We fix the damages in this case at \$1500.

It is therefore ordered that the judgment appealed from be reversed and the verdict set aside; that the plaintiff have judgment against defendants, *in solido*, for the sum of fifteen hundred dollars; and that the preliminary injunction issued herein be perpetuated, with costs in both courts.

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No. 2392.—*D. KELHAM & Co. v. STEAMSHIP KENSINGTON, MASTER AND OWNERS.*

In this case the vessel cleared at the port of Boston for the port of New Orleans, with a cargo for the latter place. While on her voyage she encountered a storm at sea, by which a portion of her cargo was damaged. The consignee at New Orleans brought suit against the vessel for the damage done to a lot of furniture on board. Held—That it being shown by the bill of lading that any damage done to the cargo, or any portion thereof, from accident of machinery, boilers, or dangers of the seas of any kind, were excepted, and the damage in this case was caused by a storm at sea, that it was therefore incumbent on the plaintiffs to show affirmatively, to enable them to recover, that the damage was caused by the fault or negligence of the carriers.

**A**PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. C. E. Schmidt and A. & M. Voorhies*, for plaintiffs and appellees. *Randolph, Singleton & Browne*, for defendants and appellants.

HOWELL, J. This is an action to recover \$703, alleged to be the amount of damage to certain articles of furniture shipped, as per two bills of lading, on the steamship Kensington from Boston to New Orleans, in April, 1866. The plaintiffs asked for a writ of sequestration against said vessel; that the master and owners thereof be cited, and judgment against them *in solido*, with interest, costs and privilege, be rendered.

The defense is, first, a general denial; second, an allegation that the damage, if any, was produced by causes for which they were not responsible; and, third, a peremptory exception that the contract sued on is an admiralty one, and the action a proceeding *in rem*, of which the State courts have no jurisdiction.

From a verdict and judgment in favor of plaintiffs for \$500, defendants have appealed. Plaintiffs ask an amendment of the judgment for the full amount claimed.

Citation, addressed "to the steamship Kensington, master and owners," was served personally on M. S. Hedge, master; defendants came into court and answered the petition, and proof was admitted without objection that "the Merchants' Boston and New Orleans Steamship Company," an incorporated joint stock company, were the owners.

Under these pleadings and facts, and the authority of the case of *Southern Dry Dock Company v. Steamboat J. D. Perry*, Captain A. Baird and owners, 23 An. 39, the personal action against the master and owners is maintained, but not the enforcement of the privilege, as it is a maritime line, which, it is now well established, can not be created by a State.

From the evidence we are satisfied that the damage to plaintiffs' property was caused directly by the escape of steam into the hold of the vessel, through a pipe constructed and used to extinguish fire, and the question is whether this was one of the dangers excepted, and if so, were the defendants in fault?

The two bills of lading, taken together (as we must do under the pleadings and evidence in this case), exempted the defendants from all damage from accidents of machinery, boilers, steam or dangers of the seas of any kind. It is shown that the vessel, when she left Boston on the trip in question, was seaworthy; that on the second or third day out she encountered heavy weather, during which a portion of the machinery got out of order, and while it was being repaired, the engines being at the time stopped, the storm increased in violence, and the rolling of the vessel caused one of the timbers to spring and press upon the wheel connected with the valve of the pipe used to conduct steam into the hold of the vessel, thus opening the valve and letting the steam through into the part of the vessel where plaintiffs' goods were stowed, and were thereby damaged. The witnesses most familiar with this arrangement of the vessel, testify that the said valve and pipe were placed in this ship in the usual manner, and that prior to this accident they would not have objected to its position, nor anticipated the effects produced in this instance. Since the accident they suggest, very naturally, how it may not again occur from the same cause. But we infer from all the evidence that no negligence is justly imputable to the defendants in the putting of the pipe and valve in the position in which they were, in the accident to the feed-pump during the storm which necessitated the stopping of the engine, or in the rolling and straining of the vessel during the greatest violence of the storm, by which the valve of the steam pipe was opened and the

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Kelham & Co. v. Steamship Kensington, Master and Owners.

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steam admitted to the hold of the vessel, which caused the damage complained of.

It being shown that the damage resulted from causes within the exceptions, it was incumbent on plaintiffs to show that the negligence of defendants contributed to the loss, which has not been done. 10 W. 176; 12 How. 272, 352; 17 An. 9; 23 An. 584.

This view of the case renders an examination of the bills of exception taken by defendants unnecessary.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of defendants, with costs in both courts.

Rehearing refused.

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No. 2833.—THE CITY OF NEW ORLEANS v. C. MOSEAL et al.

In 1868 the city of New Orleans leased the Dryades Market to defendant for one year. In 1869, before the year had expired, the city annulled the contract and took possession of the market. Afterward the city brought suit on the notes given by the lessee for the market for one year. Held—That the city having annulled the contract before the expiration of the term of the lease, and having again taken possession of the market, she could not recover on the notes given by the lessee.

**A**PPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. George S. Lacey*, City Attorney, for appellant. *E. T. & E. J. Fellowes*, for defendant and appellee.

LUDELING, C. J. This is an action to recover the amount of a promissory note executed by C. Moseal, and indorsed by John Gaudin. The defense is failure of consideration.

It appears from the record that on the thirty-first of December, 1868, the defendant, Moseal, entered into a contract with the city of New Orleans, whereby he leased the Dryades Market for the term of one year, and the note sued on is one of a series given for monthly installments as the consideration for said lease. On the sixth of April, 1869, before the maturity of this note, and before the expiration of the term of the lease, the Mayor officially notified the defendant, Moseal, that in consequence of his failure to promptly pay one of his notes, the contract had been annulled; that Mr. Baptiste Matharon had been commissioned to collect the revenues of the market, and the agent of Moseal was turned out and said Matharon was put in possession of the market by a police force. After this the revenues of the market were collected and paid into the city treasury by Matharon. To permit the city to recover in this suit would do violence to equity and good conscience.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed, with costs of appeal.

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Dean, Adams & Gaff (W. C. Swanson, Intervenor), v. Martin & Case.

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**No. 2456.—DEAN, ADAMS & GAFF (W. C. SWANSON, Intervenor), v. MARTIN & CASE.**

A party who has contracted with another on an immoral basis, or has made a contract which is reprobated by law, can not, after it has been executed, obtain relief from its effects through the action of the courts.

One who has induced others to buy a lot of cotton from a third person, by representing that such third person was the owner thereof, is thereafter estopped from setting up any claim thereto on his own account.

**A** PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. E. Wooldridge*, for plaintiffs and appellants. *Breaux & Fenner*, for intervenor. *R. & H. Marr*, for defendants and appellees.

LUDELING, C. J. The plaintiffs are holders and owners of a draft or order drawn by Brummel, dated May 7, 1866, directing the defendants to pay plaintiffs or order the proceeds of twenty bales of cotton then held by defendants for account of Brummel. When this order was presented for payment the defendants wrote the following acknowledgment on the back of the order:

"We have a bill of sale of twenty bales made to A. T. Hawthorn, for the benefit of A. O. Brummel, providing that the net proceeds of twenty bales average cotton be paid to the said A. O. Brummel when sold, less sixty dollars. New Orleans, May 7, 1866."

The twenty bales of cotton were sold by the defendants, and realized the net sum of \$1080. The defendants refused to pay plaintiffs, on the ground that they had been ordered by Swanson not to pay the same. In their answer they admit they hold the proceeds of the sale of the cotton, but they aver that, inasmuch as Swanson and others claim them, they call upon all the other parties to interplead, and they pray that the court may say to whom the money shall be paid. Swanson alone filed an intervention. He avers that he was the owner of 141 bales of cotton; that the cotton was seized by A. O. Brummel, who represented himself as an agent of the Treasury Department of the United States; that Brummel had a file of soldiers with him, and that he was prevented from shipping his cotton until he entered into the following agreement:

"BOWIE COUNTY, TEXAS, March 23, 1866.

Know all men by these presents that I have this day bargained and sold to A. T. Hawthorn twenty bales of cotton, to be averaged out of one hundred and forty-one bales shipped on steamer *Carrie Poole*. The net proceeds of said twenty bales average to be paid by said Hawthorn to A. O. Brummel, provided there is no seizure or detention of said one hundred and forty-one bales cotton by the Government of the United States or its agents, or, in the event of seizure or detention as aforesaid, the proceeds of said twenty bales to be paid to said Brummel, provided said one hundred and forty-one bales are released and permitted to be sold without any additional expense.

(Signed)

W. C. SWANSON."

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Dean, Adams & Gaff (W. C. Swanson, Intervenor), v. Martin & Case.

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And the cotton was released from seizure and shipped to the defendants, A. T. Hawthorn being at the time one of the firm of which defendants are the successors.

Some time after this one Oliver asked Swanson if the sale of the twenty bales of cotton to Brummel would be all right. "He said he guessed it would; that it was a swindling transaction all round, and that he thought he had got off cheap enough anyhow. This was before I bought of Brummel. I got Brummel to give the order to Dean, Adams & Gaff." He further says: "They advanced me \$1200 on the order."

We think Swanson is estopped from denying the sale to Brummel, for by his declarations to Oliver he induced innocent parties to part with their money for the cotton under the impression that it belonged to Brummel.

We are also of opinion that the contract between Swanson and Brummel was an executed contract, and courts of justice will not give their aid to afford relief from the consequences of the immoral contract entered into by the parties.

It is therefore ordered and adjudged that the judgment of the district court be annulled, and that there be judgment in favor of the plaintiff and against the defendants for the sum of \$1080, with five per cent. interest thereon from the first day of April, 1868, till paid, and for costs of both courts against the defendants and intervenor.

Rehearing refused.

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No. 1901.—E. L. BODECHTEL, etc., v. R. FRELINGHUYSEN, Widow and Executrix.

Plaintiff, a forced heir, brought suit to reduce a donation to her stepmother, made in the last will of her deceased father, which gave to her stepmother the personal property of his estate in fee simple, and the usufruct of his real estate during her widowhood. The stepmother obtained a final judgment dismissing the opposition to her account as executrix, and approving the donation. Held—That the stepmother might plead this judgment as *res judicata* against the claim of the heirs, although it had been rendered on opposition to her account as executrix.

**A**PPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. T. A. Bartlette*, for appellant. *Robert J. Kerr*, for appellee.

HOWELL, J. This is an action by a forced heir to reduce the donation *mortis causa* made to the defendant by the will of the deceased father. The defense is the plea of *res judicata*, which was overruled, and the defendant appealed.

The will gave to the widow, the stepmother of plaintiff, all the movable property and the usufruct, during widowhood, of all the immovable property of the testator's estate. The defendant, as execu-

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Bodechtel, etc., v. Frellinghuysen, Widow and Executrix.

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trix, filed an account, to which the plaintiff made opposition, on which the following judgment, which is the basis of the above plea, was rendered:

"It is ordered, adjudged and decreed that the opposition of Emma Louisa Bodechtel, wife of Leidenheimer, be dismissed, and that the executrix be declared to be *entitled to the usufruct of the entire estate*, which usufruct will cease only at her death or in the event of her entering into a second marriage; and it is further ordered that the account be approved and homologated."

From this judgment no appeal was taken. It was rendered in a proceeding between the same parties now before us, and settled distinctly the right of the defendant to the usufruct of the *whole estate* left by the deceased, which is to continue until death or a second marriage. This must be held to conclude the right of plaintiff to reduce the estate thus decreed to the defendant, as she is seeking to do in this action. Her position that the plea is not good because the question involved could only be tried and determined by the direct action, and not in an opposition to an account, can not avail. The authority in 10 An. 28, cited by her, may probably have justified an exception to the question being raised in an opposition to an account, but can not warrant us in treating the judgment thereon as a nullity.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of defendant, with costs in both courts.

Rehearing refused.

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#### NO. 3527.—SUCCESSION OF J. B. NAVARRO.

If an auctioneer has made a sale of property at the request of a curator of a vacant estate, and it turns out that the estate was not vacant, and the sale is afterward declared to be void for want of legal authority to sell, then and in such case the auctioneer has no claim against the estate for the payment of his fees as auctioneer in making the sale, but he must look to the curator or person who employed him for the payment of his fees.

**A**PPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. Charvet & Duplantier* and *M. E. Livaudais*, for appellees. *A. L. Tissot*, for appellants.

HOWE, J. This succession was originally opened as a vacant one, and A. Bonzone appointed curator. On the fourteenth March, 1870, by judgment of the lower court, Mrs. Massuco was recognized as widow in community, and Augustin D. Navarro as a legitimate son and heir of the deceased, and entitled to a certain portion of the succession.

In April, 1870, Mrs. Anselmi, a sister of deceased, took a suspensive appeal from this judgment, but the curator did not appeal.

In June, 1870, the curator obtained an order to sell the real estate of the succession on the ground simply that the estate was vacant, and as such had been under administration more than a year. Rev. C. C. 1169.

Mrs. Massuco, represented by A. L. Tissot, Esq., attorney in fact, made opposition on the ground that the succession was no longer vacant, and there were no debts, and the sale was unnecessary and illegal. The curator seems to have been impressed with the correctness of these views, for he assented to the rescission of the order of sale, and it was accordingly annulled by the judge.

In November, 1870, for some reason that we can not divine, the curator applied for another sale under the same article, 1169 Rev. C. C., and the sale was made by De Feriet, auctioneer. The order was obtained *ex parte*, and whether the recognized widow and heir were aware of its existence we are unable to say.

The parties to whom the adjudication was made refused to take the property on the ground that the order of sale was illegal, and the sale null and void, the estate not being vacant; and on a rule being taken by the curator, and this defense being pleaded, the court sustained their views, dismissed the rule, and declared the adjudication null and void. No appeal was taken from this judgment by any one.

In March, 1871, the curator filed a provisional account, which was opposed by Mrs. Massuco, on the grounds:

*First*—That the active mass of the estate was not correctly set forth, Bonzone having been attorney in fact of Navarro for some time before his death.

Upon this branch of the opposition we do not find sufficient sustaining evidence. Bonzone was undoubtedly agent of Navarro before his death, but it does not appear that he has wrongfully retained in his hands anything collected by virtue of his agency.

*Second*—That the item of \$704 30, bill of De Feriet, auctioneer, for making the illegal sale was improperly charged to the succession.

We think there is more force in this point. The curator had no right to apply for the sale. The succession was not vacant, as to him at least, for the widow and heir had appeared in this parish, and had been recognized by the court. That Mrs. Anselmi appealed from this judgment, can not avail the curator or any one claiming in virtue of an employment by him. He had acquiesced in the judgment by not appealing, and we think that the auctioneer whom he employed must look to him individually for compensation.

It is therefore ordered that the judgment appealed from be reversed; that the opposition of A. L. Tissot, agent, be sustained as to the item of \$704 30, auctioneer's fees; that in other respects the opposition be dismissed, and that A. Bonzone pay costs of appeal.



Schaffer & Co. v. Forbes and Thompson—Baker, Garnishee; and Thompson v. Forbes—Baker, Garnishee.

No. 2907.—A. C. SCHAFER & CO. v. JOHN C. FORBES and WADDY THOMPSON—GEORGE BAKER, Garnishee; and WADDY THOMPSON v. JOHN C. FORBES—GEORGE BAKER, Garnishee.

A person who has acted with other parties in an illicit enterprise, the object of which is to procure a false bill of lading for a cargo of cotton, and to destroy the vessel on which the cotton is to be shipped, for which such person has received a sum of money from the other parties, can not, when the other parties have absconded and an attachment has been taken out against them, and such person is made garnishee in attachment, set up that he received the amount of money from the conspirators in the fraud as a compensation for his services in enabling the creditors to ferret out the fraud, and thereby hold the same for his own benefit. To allow him to hold the amount thus received for his own benefit, would be to allow him to make a dishonest appropriation of the money of the debtor to the injury of the creditor.

**A** PPEAL from the Fourth District Court, parish of Orleans. *Théard, J.*  
William H. Hunt and Semmes & Mott, for plaintiffs and appellees.  
A. & M. Voorhies, for garnishee, appellant.

LUDELING, J. C. Schaffer & Co. instituted suit against John C. Forbes, an absconding debtor, and Waddy Thompson, *in solido*, for \$12,525 26, and George Baker was sued as garnishee.

There was judgment in favor of the plaintiffs, Schaffer & Co., against Forbes for \$11,262 55, with privilege on the property attached. Subsequently it was agreed by the counsel of the plaintiffs in both of the above entitled suits and of George Baker that the two cases should be tried together as to the rights of the plaintiffs in the causes and the liability of George Baker. And on the twentieth May, 1870, there was judgment in favor of A. C. Schaffer & Co. against George Baker, garnishee, for the sum of four thousand dollars, with legal interest from judicial demand, the money, when collected by the sheriff, to be kept by him, subject to the order of the court *a qua*, until the rights of Waddy Thompson to the fund be decided in the case of Thompson v. Forbes and Baker, garnishee. From this judgment Baker alone has appealed.

The garnishee's answer to the interrogatories propounded is as follows: "That he owes nothing to Waddy Thompson or to J. C. Forbes; that he has nothing for them or either of them in his possession or under his control; that the four thousand dollars deposited by deponent is not the property of said Forbes or Thompson, or of either of them; and that said sum was paid over to him by Forbes as his (deponent's) share in an illicit enterprise contemplating the destruction of the ship C. C. Colson; that deponent did not implicate himself by any act or deed in this nefarious scheme, but acted all the time under the advice of several gentlemen with the view of ferreting out the fraudulent and criminal transaction, and was instrumental in exposing the whole matter to light and preventing the departure of the brig Colson. Further deponent saith not." The plaintiffs, Schaffer

Schaffer & Co. v. Forbes and Thompson—Baker, Garnishee; and Thompson v. Forbes—Baker, Garnishee.

& Co., traversed the answers of the garnishee, and they offered in evidence the published statement of George Baker relative to said transaction, in which he says :

"About this time Forbes said to me, 'We understand each other now; that the vessel would be loaded with bogus freight; that bills of lading would be signed for more freight than would be put on her; that she would leave for Liverpool, where she would never arrive.' I replied evasively that there would be no trouble about that. Forbes said, 'I will give you \$5000, \$2500 on sailing and \$2500 when you return. Go on and do this, and you shall never want for anything.' I then left and went to a friend, a merchant of high standing, and disclosed to him the whole plot. Before the papers arrived I was told to go to Waddy Thompson's office, and went there with him (Forbes). Mr. Thompson requested me to sign bills of lading for two hundred and fifty bales of cotton, saying he would give me a guarantee, which, he stated, was customary. I replied that I had signed bills of lading for small lots when satisfied; that they had been received, though I had not seen them, and that the signing would depend upon the guarantee. Thompson then turned to a clerk and ordered him to write out a guarantee for two hundred and fifty bales of cotton, which the clerk, a young man of about sixteen or seventeen years, did, signing the same, 'Waddy Thompson, per pro.' himself (I do not remember his name). It struck me as peculiar that Mr. Thompson did not sign it himself, and I left the office without signing. On returning in about half an hour, I told Thompson that it was impossible for me to sign the bills of lading until the bill of sale of the brig should arrive and she be properly turned over, as I would be making myself liable and subjecting my property to seizure.

"Just before the brig was cleared, however, Forbes took me into a private room in the Hancock Club and gave me four \$1000 notes, saying that he was short and that he would give me the other \$1000 some other time, and that he had just gotten the money from Waddy Thompson. He had previously told me that Thompson was one of the head men in the concern and that he (Forbes) was a bankrupt; all the proceeds of the cotton, etc., had to pass through Thompson's hands. I accepted the \$4000, not wishing to appear anxious, as I had predetermined to turn it over to whoever might have the best claim upon it. Early the next morning I deposited the \$4000 in the Bank of America in my name and reported the deposit to the underwriters. The plan as revealed by Forbes to me was, that I should take the Colson out and destroy her. He did not wish to hear from me for sixty or ninety days, in order to have plenty of time to make money arrangements. In conclusion, I would state that what I have done has been done solely with a view to bring to justice, if possible, a number of

*Schaffer & Co. v. Forbes and Thompson—Baker, Garnishee; and Thompson v. Forbes—Baker, Garnishee.*

men who have combined to perpetrate the grossest and most diabolical fraud, and whose acts are calculated to work injury to all classes of the mercantile community. I have the approval of my own conscience for the course I have pursued, and the testimony of the underwriters and my friends will sustain my statements, which were made as soon after I possessed the facts as possible.

(Signed)

GEORGE BAKER."

And yet George Baker now claims the \$4000 as his, and contends that he has earned it by giving his valuable time to ferret out the fraud contemplated by Forbes and Thompson. The pretext is too flimsy to require argument to show its unsoundness. If he received the money with the intention of appropriating it to himself, it was a fraud upon the parties negotiating with him for his services and a dishonest appropriation of the property of the debtor to the injury of the creditors, which the law will not allow.

We think the judgment against Baker correct.

It is therefore ordered and adjudged that the judgment of the district court be affirmed, with costs of appeal.

Rehearing refused.

#### No. 3677.—JOHN S. WOODWARD v. GROSS & PAYAN.

An overseer of a sugar plantation who has contracted with the planter to oversee the place for so much on each hogshead of sugar made on the place during the year as his wages or salary, and who has been turned off before his term of service expired, must wait until the year is out, or until it can be ascertained with legal certainty the number of hogsheads of sugar that was made during the year. In case judgment has been given before the year is out for the portion of the time which the overseer served, on a calculation made as to the quantity of hogsheads assumed to be made in the year, and an appeal is taken therefrom, then and in such case the cause will be remanded to the court *a qua*, with instructions to ascertain the number of hogsheads made, and give judgment for so much per hogshead on the quantity actually made.

**A**PPEAL from the Fifteenth Judicial District Court, parish of Assumption. *Beattie, J. Carver & Sims*, for plaintiff and appellee. *Nicholls & Folse*, for defendants and appellants.

WYLY, J. The plaintiff claims of the defendants two hundred dollars on a contract for taking off the sugar crop of 1870, two hundred and five dollars on account, and two thousand dollars on a contract for his services as overseer on the plantation of the defendants, in the parish of Assumption for the year 1871, alleging that as he was unjustifiably discharged by the defendants on the thirteenth May, 1871, his whole year's salary became thereby due and exigible.

The defense is the general issue, a plea of payment of the claim for taking off the crop of 1870, and an averment that the defendants were justified in discharging the plaintiff in May, 1871; also a reconventional

demand is set up in the answer for two hundred and fifty dollars damages for loss of molasses shipped to New Orleans, and the further sum of three hundred and seventy-nine dollars for moneys expended by them for plaintiff's use and benefit.

The court came to the conclusion that the defendants were justified in discharging the plaintiff, but that he was entitled to \$450 for his salary under the contract, from the first of January, 1871, to the date of his discharge, and also found the other claims set up by him to be correct; and finding also the defendant's reconventional demands to be correct, the court deducting the same from the aggregate amount of the plaintiff's claims thus ascertained, finally gave judgment for the plaintiff for the balance of two hundred and twenty-six dollars. From this judgment defendants appeal.

The main controversy is as to the correctness of the claim for salary for the year 1871, the court fixing the value thereof at four hundred and fifty dollars from first January to the thirteenth May, the date at which the plaintiff was discharged.

In the contract under which the plaintiff was employed and upon which this claim is based, we find the following clause: "As a compensation of his services Mr. J. S. Woodward is to have an interest of eight dollars per every hogshead made on the said plantation."

This suit was filed on the tenth July 1871, and judgment rendered on the third day of November following. At this time it was impossible to fix, with legal certainty, the number of hogsheads raised on the plantation that year; and without this, the salary could not be estimated, either for a part, or the whole year, because the compensation was to be eight dollars per hogshead. The plaintiff claimed that with proper cultivation the cane on the place ought to yield two hundred and fifty hogsheads, which, at eight dollars per hogshead, would make his salary amount to two thousand dollars; the court, however, fixed the probable amount of the crop at one hundred and fifty hogsheads, and upon that calculated that the plaintiff ought to recover four hundred and fifty dollars for his services up to the time he was discharged. We think the yield of the crop could not be legally established until it was actually raised and taken off. And, therefore, there was no certain basis upon which the court could act in determining the sum due the plaintiff on account thereof.

As the fact can now be shown, we believe that justice requires this case to be remanded for new trial.

It is therefore ordered that the judgment herein be annulled, and that this cause be remanded for new trial, appellee paying costs of appeal.

## No. 2489.—SOPHIA PETERS, Administratrix and Tutrix v. GEORGE SPITZFADEN et al.

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A judgment declaring a sale of property under execution a nullity, is not *res judicata* as to the purchaser who was not a party to the suit. The purchaser is therefore legally entitled to the rents of such property until his title is declared null and void by judicial proceedings to which he is a party.

**A** PPEAL from the Seventh District Court, parish of Orleans. *Collens, J. Hyman, Wallace & Handlin*, for plaintiff and appellant. *Henry C. Miller*, for defendants and appellees.

LUDELING, C. J. The plaintiff sues Spitzfaden and the sheriff, Bienvenue, and his sureties for the rents of certain property, possessed and occupied by Spitzfaden from 1865 to 1869, alleging that the property belongs to the succession of A. Peters and her minor children.

From the record, it appears, that on the twenty-eighth day of October, 1865, George Spitzfaden bought at sheriff's sale made under an execution against Sophia Peters, the right, title and interest of Sophia Peters in and to a certain lot, situated at the corner of Eighth and Annunciation streets, in the city of New Orleans. That, on the twentieth of June, 1869, this sale was decreed to be a nullity, in a suit between Sophia Peters, tutrix, v. Catherine Frelinghouse, Peter Bunger, and the sheriff.

It is admitted in evidence that the lot in question had been acquired by A. Peters, the husband of Sophia Peters, during the existence of the community, and that A. Peters died in 1861.

From these facts we deduce the following conclusions: that the judgment rendered in the suit between Sophia Peters, tutrix, v. Catherine Frelinghouse, Peter Bunger, and the sheriff, is not *res judicata* as to George Spitzfaden, the purchaser of the property, who was not a party to that suit, and that George Spitzfaden had the right to collect the half of the rents of the property until his title to the undivided half interest in and to said property shall have been declared null, in a contest in which he is a party. There is no evidence in this record to authorize us to declare the nullity of his title, nor is the nullity prayed for in this suit. Spitzfaden bought the interest of the widow in community in and to certain community property under an execution issued on a judgment against her.

There is nothing in the record before us to show that there was any other community property, or any community debts.

It is therefore ordered and adjudged, that the judgment of the district court be set aside, and that there be judgment against the plaintiff as in case of nonsuit, with costs in both courts.

Rehearing refused.

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*The Merchants' Mutual Insurance Company v. Blandin, State Tax Collector; and The Germania Insurance Company v. Blandin, State Tax Collector.*

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**No. 2677.—THE MERCHANTS' MUTUAL INSURANCE COMPANY v. O. C. BLANDIN, State Tax Collector of the Third District, and THE GERMANIA INSURANCE COMPANY v. O. C. BLANDIN, State Tax Collector, Third District. (Consolidated.)**

An insurance company can not be compelled to pay more than one license for permission to carry on their business, although they may have established more than one office or place of business. The license imposed on insurance companies is a tax on the occupation, and not on the business establishment, and must, therefore, be uniform on all such companies.

**A** PPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Albert Voorhies and C. E. Schmidt*, for plaintiffs and appellants. *Simeon Belden*, Attorney General, and *Hornor & Benedict*, for defendants and appellees.

**TALIAFERRO, J.** In each of these cases the State tax collector for the Third District of New Orleans having made a seizure of property to satisfy the debts and costs claimed to be due by the defendants, injunctions were taken out by them on the ground that having paid the license tax due by them for the year 1869, viz, the sum of \$1000 fixed by law, no other or further sum can legally be required from them for license for the same year. Judgment was rendered against the insurance companies, and they have appealed.

It appears from the evidence that each of the companies has, besides its main place of business where policies of insurance are issued and payments and adjustments are made, an office elsewhere within the limits of the city for the accommodation of people residing in places remote from its principal place of business. It seems that the tax collector demanded the payment of license for these subordinate or auxiliary offices, and that in default of payment, he made seizures.

The Constitution of the State, article 118, provides that "The General Assembly may levy an income tax upon all persons pursuing any trade, occupation or calling, and all such persons shall obtain a license as provided by law." It has been frequently determined that the license tax is simply an amount levied upon a pursuit, business, trade, occupation or calling, and is wholly different in its nature from a tax on property. To be constitutional it must be equal and uniform on all persons pursuing or following the same business, occupation or calling. In the case before us, the insurance companies have each a stated known place of business, where their officers meet and transact the business peculiar to the occupation they are engaged in, the place known to the community at large where contracts relating to insurance are entered into, and settlements and payments growing out of such contracts are made. For the carrying on of this business the company pays the license. The fact that they have mere agencies elsewhere, merely subsidiary to the exercise of their calling or occupation, does

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not violate the provisions of the revenue act of 1869, making "every person having more than one store or other establishment or place of business pay the license upon each separately."

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and that the injunction be perpetuated. It is further ordered that there be judgment in favor of the plaintiffs, the defendant and appellee paying costs in both courts.

HOWELL, J., *concurring*. In my view the plaintiffs may properly be relieved, because there is no provision of the law fixing a State license tax on agencies of insurance companies incorporated under the laws of this State, as there is in regard to banking agencies; but I am not prepared to say they should be relieved on the principle upon which the majority of the court have placed their action.

NO. 2480.—MRS. A. M. WINTER v. WILLIAM H. REYNOLDS.

A person who has erected a wall on the line of his lots or premises, which is afterward used by the adjoining proprietor as a wall in common, can recover from such person one-half the cost of the construction of such wall. In such a case the later proprietor is bound for one-half the cost, although he has purchased the property from another, who, previous to the sale, used the wall as one in common.

**A** PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Randolph, Singleton & Browne*, for plaintiff and appellee. *B. Egan*, for defendant and appellant.

Howe, J. This litigation concerns a party wall, the plaintiff claiming, in this court, half the cost of the portion used by defendant, under articles 675, 685 Revised Civil Code.

The defendant contends that the shed on his premises, resting on plaintiff's wall, was built by a previous owner, his vendor; that he bought without knowledge of the claim; and that the claim is a personal one against his vendor alone. In support of this position counsel cite *Harrison v. Falk*, 2 La. 92, which we do not perceive to be in point.

The defendant uses the party wall, and neither he nor any one else has paid plaintiff the half of its cost. It would seem that he is liable. 14 An. 338; 20 An. 553; 22 An. 114.

It is conceded, however, that the judgment should be reduced to half the cost of the portion of the wall actually used, that is to the sum of \$233 57.

It is therefore ordered that the judgment appealed from be reduced in amount, as to defendant, to the sum of two hundred and thirty-three dollars and fifty-seven cents, and as thus amended it be affirmed, plaintiff and appellee paying costs of appeal.

Successions of Andrew and Marie Durnford, Maspero and Olivier v. Urquhart and Reid, etc.

NO. 2444.—SUCCESSIONS OF ANDREW and MARIE DURNFORD, PIERRE MASPERO and GEORGE OLIVIER v. GEORGE URQUHART and JAMES REID, etc.

An action by creditors to enforce a claim against a succession, can not be maintained after the succession has been closed and the heirs have been legally put in possession of the estate.

**A**PPEAL from the Parish and Probate Court, parish of Plaquemines. *William M. Prescott*, Parish Judge. *Sambola & Ducros*, for intervenors and appellants. *James Foulhouze*, for the administrator, appellee.

LUDELING, C. J. Andrew Durnford died on the thirteenth of July, 1859. On the twenty-eighth of April, 1866, his widow was appointed dative testamentary executrix of his will. On the tenth of June, 1866, she died; on the twenty-third of July, William Erskin was appointed executor of the will of A. Durnford and administrator of the succession of Mrs. Durnford, and on or about the thirty-first of December, William Erskin died, and no one was appointed executor of the will of A. Durnford or administrator of the succession of Mrs. Durnford after Erskin's death.

On the twenty-fourth of January, 1867, the heirs of Mr. and Mrs. Durnford applied to be recognized as the heirs of their father and mother, and to be put in possession of their estate. The order was rendered, putting the heirs in full possession of all the property belonging to the successions, according to law, "*upon payment of the debts, if any there are.*" The heirs, who were all of age or emancipated, were put in possession of the property, and they continued to control the property as owners without any one questioning their right until about the twenty-second of July, 1869, when Pierre Maspero and George Olivier filed an application in the probate court praying that George Urquhart and James Reid be cited to show cause why they should not pay their debts, and why the plantation belonging to the successions of A. and M. C. Durnford should not be sold to pay their debts.

After the death of William Erskin, George Urquhart and James Reid were confirmed as the executors of the testament of William Erskin, and they had undertaken to render an account of his administration of the successions of Durnford, over which the heirs and the creditors had contested, and there was a judgment homologating the account, so far as the claims of Maspero and Olivier were concerned. At the time the account rendered by Urquhart and Reid was filed, the first of June, 1867, the heirs had been put in possession of the property, and there was no succession. Under this state of the case, we think the plaintiff had no right to proceed against the succession. C. P. 995, 996; 21 An. 365; 1 An. 181; 4 An. 224; 22 An. 23; 23 An. 97.



Successions of Andrew and Marie Durnford, Maspero and Olivier v. Urquhart and Reid, etc.

What effect the judgment on the account rendered by the executors of Erskin of his administration (to which the heirs and creditors of Mr. and Mrs. Durnford were parties) had or may have against the heirs personally, we do not feel authorized to say in this suit, which was instituted in the probate court. We think the heirs and intervenors are entitled to a judgment in their favor rejecting the plaintiffs' demands in this suit.

It is therefore ordered and adjudged that the judgment of the court *a qua* be reversed, and that there be judgment in favor of the intervenors rejecting the plaintiffs' demands, with costs in both courts.

No. 3542.—STATE ex rel. D. C. BYERLY, Clerk of the Third District Court, v. JOHN S. WALTON, Administrator of Finance.

A clerk of one of the district courts of the parish of Orleans has not such interest, either as clerk of the court or as a citizen and taxpayer, as will authorize him to invoke the writ of mandamus to regulate the jurisdiction of the several courts of the parish. The clerk of a court can not, therefore, obtain a mandamus against the Administrator of Finance, compelling him to bring suits in his court against delinquent taxpayers, although the court of which he is clerk alone has jurisdiction of such suits when brought. The question as to whether suit is to be brought, is left to the discretion of the officers having control of the finances of the city.

**A** PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. Semmes & Mott*, for plaintiff. *George S. Lacey*, City Attorney, for defendant and appellant.

WYLY, J. The relator alleges that he is the clerk of the Third District Court; that said court is the only court of competent jurisdiction to entertain suits for the recovery of taxes due the city of New Orleans, where the amount is one hundred dollars or less; that in such cases none of the other district courts of the parish of Orleans have jurisdiction; that John S. Walton, the Administrator of Finance, has declared his intention to publish, and has published in the official journal, the list of taxpayers who have failed to pay the taxes for the year 1871, exigible on the thirty-first July, 1871, and that it is his intention to file all tax bills or claims for taxes of that year in the Fourth and Eighth District Courts, whether the same exceeds or is less than one hundred dollars in amount, claiming the right to do so under the provision of the ninth section of the act approved thirteenth March, 1871.

The relator further avers that said section gives no such right to the administrator, and was not intended to give him authority to select courts for the filing of tax bills or claims in any court but the court having jurisdiction to try the same; that the relator has called on the Administrator of Finance and demanded that all suits for the collection of taxes, where the amount claimed is one hundred dollars and under, shall be filed in the Third District Court, parish of Orleans,

State ex rel. Byerly, Clerk of the Third District Court, v. Walton, Administrator of Finance.

which demand has positively been refused; that the amount allowed by law for such suits greatly exceeds five hundred dollars, and that the relator is injured at least one thousand dollars by the refusal of the Administrator of Finance as aforesaid.

The prayer of the petition is that the writ of mandamus issue, commanding the said Administrator of Finance to publish the list of tax bills or claims in the official journal, and if said tax bills or claims are not paid within the legal delay, after said publication, to file suit on the same in the Third District Court, where the claims amount severally to one hundred dollars or less.

The clerks of the Fourth and Eighth District Courts intervened on the grounds stated in their petition. The answer of the Administrator of Finance discloses several grounds of defense. The most important is that the relator has no interest to appear, and seek to regulate the jurisdiction of the several courts; the only interest which he avers being that of prospective fees, which is not such as is deemed in law an interest, authorizing him to appear in the capacity of relator herein; that if it be true that the respondent can be made to institute suits in disregard to the statute cited and relied on by him, and contrary to the direction of the City Council, the writ of mandamus would not lie to compel him to institute tax suits of the amount of one hundred dollars or less in the Third District Court, because the justices of the peace have concurrent jurisdiction, and the respondent would have discretion in the selection. The court dismissed the intervention and rendered the mandamus peremptory as prayed for by the relator. From this judgment the Administrator of Finance and the city of New Orleans have appealed.

We think the judgment of the court below is erroneous. The relator discloses no interest to justify this litigation. Until he earns fees the city of New Orleans owes him nothing. Where does he get the right, either as clerk or as a citizen, to exercise supervisory control over the city of New Orleans or its Administrators? We do not see what right he has to demand of the Administrator of Finance that he shall publish the list of delinquent tax payers in the official journal; and also demand of him that certain suits shall be instituted by the city in the Third District Court, of which he happens to be clerk. To make such demands is certainly not one of the prerogatives of his office. If the city should sue one of its delinquent tax payers in the wrong court, it might be the interest of the latter to complain; or if he chose to make no objection the judgment would be without effect, because the decree of a court without jurisdiction *ratione materiæ* is an absolute nullity. But, say the counsel, suits of this kind will involve the city in debt, such cost bills being an unnecessary and idle expenditure of money; and as tax payer the relator has an interest in

*State ex rel. Byerly, Clerk of the Third District Court, v. Walton, Administrator of Finance.*

suing to prevent the evil. It will be time enough for the relator to complain, as a tax payer, when he is called upon to pay an illegal or improper tax.

The city government can not be administered if its operations are to be embarrassed with the supervision of every tax payer, or if each tax payer has the right, by suit, to prevent it from incurring such debts as he may fancy to be illegal, improper or unwise.

We entirely agree with the respondent, that the clerk of the Third District Court has no interest to apply for the remedy of mandamus, in order to regulate the jurisdiction of the several courts of the parish of Orleans. As to him, we think, this is purely a speculative question, which this court will not undertake to solve, because he has no interest, as far as the record shows, to demand the solution thereof.

Let the judgment appealed from be annulled, let the mandamus be disallowed and the petition be dismissed at the costs of the relator.

Rehearing refused.

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No. 2439.—J. B. MICHOUX v. CHARLES NOLAN.

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115	490

A claim for damages which is made in a suit to enjoin the sale of property on the ground that the seizure was illegal, unsupported by evidence on the trial, will not be considered in estimating the amount necessary to give the appellate court jurisdiction of the appeal.

**A**PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. E. Guillet*, for plaintiff and appellant. *Sambola & Ducros* for defendant and appellee.

**TALIAFERRO, J.** The defendant, Nolan, having obtained judgment in the year 1869, in the Seventh District Court, of the parish of Orleans, against the plaintiff and others for costs in a certain suit then pending in that court, issued execution, and the sheriff seized several lots of ground belonging to the defendant in that suit. The defendant, who is plaintiff in this case, obtained from the Sixth District Court, of the parish of Orleans, a writ of injunction to restrain the sheriff from selling the property seized, alleging informalities in the proceeding, and claiming one thousand dollars damages. The defendant in this injunction suit filed an exception to the injunction of the Sixth District Court, and also took a rule on the same ground against the plaintiff to dissolve the injunction. A judgment was rendered both on the rule and on the exception, making the former absolute and sustaining the latter, giving the defendant judgment dissolving the injunction with five per cent. damages *in solido* against the plaintiff and his surety on the injunction bond. From each judgment the plaintiff appeals.

We are unable to find anything in the record which authorizes this court to take jurisdiction of this case. The amount for which execu-

Michoud v. Nolan.

tion issued is one hundred and sixty-one dollars and sixty cents, clerk's costs, and for sheriff's costs besides, the amount not being specified.

We consider the claim of the plaintiff in injunction for one thousand dollars damages as unfounded, and made with the view of obtaining an appeal to this court. No effort was made to prove that damages had been sustained by the issuing of injunction.

It is therefore ordered, that the appeals taken in this case be dismissed.

Rehearing refused.

No. 3732.—D. BLUM, STERN & CO. v. GEORGE H. SALLIS.

A third holder of a promissory note, indorsed in blank, is not entitled to recover thereon without proving the signature of the indorser. In such a case if the records show that the indorsement on the note was not proved in the court below the cause will be remanded.

**A**PPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. R. A. Hunter*, for plaintiffs and appellees. *H. S. Losee*, for defendant and appellant.

**TALIAFERRO, J.** There is a motion to dismiss in this case on the ground that the only matter in controversy between the parties is a sum less than five hundred dollars. The amount sued for determines the jurisdiction, and the amount sued for largely exceeds five hundred dollars. The motion is overruled.

This is an action on a promissory note. Citation was served at the defendant's domicile by delivering copies of the petition and citation to a free person above the age of fourteen living in defendant's house, he being absent. No answer was filed. A default was taken and afterwards confirmed and judgment rendered for the amount claimed. The defendant appealed. The defense is that judgment was rendered upon insufficient evidence. The note of evidence is brief, merely reciting that "John Weil, sworn, says he knows the signature to the note shown him, and that he knows the note was signed by Mr. Sallis."

The petition alleges that plaintiffs acquired the note sued on by the indorsment to them of B. Weil & Brother, the payees. No evidence is introduced to prove the indorsment. C. P. article 312; 20 An. 103 and 547; 12 Rob. 518. We think the defense should prevail.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that this case be remanded for further proceedings according to law, the plaintiffs and appellees paying costs of this appeal.

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State ex rel. Van Orden v. Sauvinet, Civil Sheriff, etc.

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No. 3869.—STATE OF LOUISIANA ex rel. W. VAN ORDEN v. C. S. SAUVINET, Civil Sheriff, etc.

The Supreme Court is vested with power to issue the writ of habeas corpus in a case where a party to a suit before a district court has been imprisoned by the judge for a contempt of court, if the amount in dispute in the main action is sufficient to give it jurisdiction of the appeal, provided the contempt is connected with or grows out of the main action.

A contempt of court is an offense against the State, and not an offense against the judge personally, and therefore the order of the judge inflicting punishment for such contempt comes within the range of the pardoning prerogatives vested by the constitution in the Executive.

**A**PPPLICATION for a Writ of Habeas Corpus. *Cooley, J. George S. Lacey and Chas. S. Rice*, for relator. *C. T. Beamis*, for respondent.

Taliaferro, Justice, delivered the opinion of a majority of the judges sitting at chambers to hear the habeas corpus granted in this cause.

TALIAFERRO, J. The relator complains that he is under illegal arrest and held in custody by the civil sheriff of the parish of Orleans in obedience to an order rendered by the judge of the Sixth District Court of the parish of Orleans, on the sixth of March, 1872, sentencing him to arrest and to be held in custody by the sheriff for the term of ten days for an alleged contempt of the orders of the said court. He alleges that for the offense charged against him, and for which he was sentenced as aforesaid, and under pretense of which he is now under arrest and deprived of his liberty, he has applied to and obtained from the Governor of the State of Louisiana a full pardon and remission of said offense, and that he has presented the same to the sheriff and demanded his release, but notwithstanding the sheriff refuses to discharge him unless under an order of the court which authorized the arrest and detention of the relator. He therefore applies for a writ of habeas corpus directed to the said sheriff commanding him to bring the relator before the Supreme Court of Louisiana or any of the judges thereof, and show cause why he thus keeps the relator imprisoned and deprived of his liberty, and why he should not be released and discharged. He prays for relief, etc.

The facts seem to be that in the month of February of the present year suit was brought against Van Orden, the relator, by J. B. Louis to recover from him a cash box and its contents, alleged to contain the amount of thirty-five thousand dollars in money and public securities, which box and its alleged contents had been deposited with the relator for safe keeping. A writ of sequestration was issued to take the box out of the hands of the relator, and upon his refusal to deliver it he was sentenced to be arrested by the sheriff and to be held in custody by him for the period of ten days as for a contempt of court. Application was then made to the Governor of the State for a pardon which was granted. The sheriff, conceiving it to be his duty to hold the

party in custody until otherwise ordered by the court, declined to release the prisoner upon the presentation of the pardon granted by the Executive; and at this stage of the proceedings the application was made to this court or to any of the judges thereof for a writ of habeas corpus which was issued accordingly.

The questions for determination are—

*First*—Is this court or any of the judges composing it vested with power to issue the writ of habeas corpus prayed for in this case, and to maintain jurisdiction of the matters presented by the petition of the relator?

*Second*—Has the Governor of the State the power to grant a pardon to a party sentenced to imprisonment by a court for a contempt of its authority?

Article 792 of the Code of Practice provides that "The Supreme Court and each of the judges thereof shall have power to issue writs of habeas corpus at the instance of persons in actual custody, in cases when they may have appellate jurisdiction," etc. We regard the order under which the party in this case was arrested, and is held in custody by the sheriff, as constituting a part of the proceedings in the suit of Lewis v. Van Orden. The order of sequestration was rendered by the judge in the exercise of his judicial functions in determining the issues presented by the parties. The order of imprisonment consequent upon the relator's alleged contempt, forms part of the proceedings in the action pending. It grew out of and constituted an important part of those proceedings. It is not easy to disconnect it from them. We do not view it in the light of a separate, independent, isolated action or proceeding detached from the main action, and wholly unconnected with it. If we entertained a doubt on this point we should feel it to be our duty, in a case involving a question of personal liberty to assume jurisdiction. The matter in controversy between the parties to the suit is clearly within the jurisdiction of this court. Besides, the relator presents himself as occupying also another ground. If the order of imprisonment were considered a decree or judgment entirely distinct from the suit, in the prosecution of which it originated, that decree or judgment of the court is one from which the relator would have the right of appeal. He alleges under oath that that decree, by depriving him of his liberty, detention from his family and suspension from his business, injures him to an amount exceeding five hundred dollars.

The next inquiry is, has the Governor the prerogative of pardon in cases of conviction and punishment for contempt of the authority of a court. The investigation which we have been able to make of this question, does not satisfy us that the chief Executive officer of the State is without power to extend pardon to a party convicted and

punished for contempt of court. We find nothing in the constitution of the State which makes an exception in such cases. That the President of the United States is clothed with the power to grant pardons in cases where judges of the United States courts punish for contempts is clearly settled. 4 Opinions of Attorneys General, p. 458; 5 ditto, p. 579; Blatchford's Circuit Court Reports, vol. 7, p. 24, and cases there cited.

The analogy between the exercise of such a power by the President in all the States, in cases of the sort arising in the courts of the United States, and the exercise of that power in a single State by its Governor, in the same class of cases arising in the courts of a State, seems to be strong and well defined. There being no exception found in our State Constitution precluding in such cases the exercise of the pardoning prerogative by the Governor of the State, we feel no hesitancy in recognizing its existence. That the offense arising from a contempt of the authority of a court is one which, from its nature, should be summarily punished, to the end that an efficient and wholesome exercise of judicial powers may be had, no one will question. But the opinion entertained to some extent, that punishments decreed for such offenses must necessarily be inflicted at the stern arbitrament of the judge, without remission or abatement by the pardoning power, we do not find to rest upon any firm basis of principle or authority. A contempt of court is an offense against the State and not an offense against the judge personally. In such a case the State is the offended party, and it belongs to the State, acting through another department of its government, to pardon or not to pardon, at its discretion, the offender.

That this is a delicate power and should be used only in cases manifestly proper, we are at liberty in our private judgments to believe; while on the other hand we have no question that abuses in the exercise of the power of punishing for contempts may arise, although instances of the kind are rare. We can scarcely think it compatible with the genius of liberal government and free institutions, that there should be no shield to protect an individual against a tyrannical exercise by a judge of his power to punish for contempt, and therefore conclude that, upon the principle of checks and balances upon which our American governments are founded, it was not intended by the framers of them that the pardoning power should not reach a party unduly deprived of his liberty, by, it might be, a hasty and petulant fiat of a judge. That the power of pardoning in such cases is withheld from the executive departments of our State governments, the counsel representing the plaintiff in sequestration in the case before us, has not satisfied us by the authorities referred to in his brief. These seem to us to rest upon hypothesis and implications only, and

indicate no positive constitutional provision withholding the power in question. We do not see the force of the reasoning used to support the deductions made. They seem to be little better than plausible conjecture.

But we are not without authority on the question of the power of the Governor of a State to grant pardons in cases of contempts. In 1844, Walter Hickey, of Vicksburg, Mississippi, was sentenced to fine and imprisonment for contempt of the Circuit Court of Mississippi. He was pardoned by Governor A. G. Brown, and released by the sheriff, but was immediately rearrested by order of the court. Upon application to Mr. Justice Thatcher of the High Court of Errors and Appeals of Mississippi (at that time presided over by Chief Justice Sharkey), a writ of habeas corpus was issued and Hickey was brought before him. The case being heard, the prisoner was discharged. Judge Thatcher in rendering his decree said: "The whole doctrine of contempts goes to the point that the offense is a wrong to the public, not to the person of the functionary to whom it is offered, considered merely as an individual. It follows then that the contempts of court are either crimes or misdemeanors in proportion to the aggravation of the offense, and as such are included within the pardoning power of this State." *Smedes & Marshal R.* vol. 4, 751. See also *Blackstone*, vol. 4, 231.

It is proper to add, that Lewis, the plaintiff in sequestration, has no interest or right of property in the punishment inflicted. It is no concern of his, but concerns the State alone; and the rule therefore, that when a private person (as an informer for example) has acquired a right of property in a penalty, the executive can not pardon, can have no application to this case.

It is not for us to deal with this subject on the basis of inquiry into the motives of the Executive in granting the pardon to the prisoner in this case, nor to pronounce the act discreet or otherwise. In the case here presented, it is not denied that the offense was committed. Neither is it pretended that the punishment meted out for the offense was wrongfully inflicted. The party under duress pleads the pardon and remission of the offense, and claims in virtue of that pardon to be released and set at large. Entertaining the views we have expressed, we think him entitled to the relief prayed for.

It is therefore ordered, that the writ be made peremptory and the prisoner discharged.

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I concur in the opinion of Mr. Justice Taliaferro.

JOHN T. LUDELING, C. J.

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HOWE, J., *concurring*. I am not prepared to say that the pardon of



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the Executive could legally release a party committed by a judge for purposes of coercion merely, and to enforce a private right; as a contumacious witness, a defendant in injunction under article 308, C. P., or a respondent in mandamus under article 843, C. P. It is highly probable that the element of private interest in the coercive process would prevent the State of Louisiana, through its Executive, from releasing the prisoner. 4 Blackstone, 285.

But there is no such element in this case. The relator has been merely convicted in a summary way of an offense, and imprisoned for a specific period. He had been declared an offender, and the State alone is interested in his punishment as a satisfaction to her injured dignity, and an example to other citizens.

But if the State, through her judiciary, and simply in her own interest, imprison a citizen, it is plain that the State acting through her Executive can remit the penalty. 4 Smedes & Marshall 751; 4 Wallace 380. It is the State of Louisiana alone who acts in both instances, and not the individual who happens to be judge or governor.

I therefore concur in the decree.

Justices Howell and Wyly, were not present at the hearing of this cause.

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No. 3759.—CHARLES LAFITTE et al. v. MRS. M. C. DAIGRE et al.

A judicial sale of the property of the widow to pay her indebtedness to her minor children as their tutrix, is not a simulation merely, and can not therefore be disregarded by the creditors of the widow. If the creditors wish to attack such a sale on the ground of fraud they must bring their action within one year, otherwise it is prescribed.

**A**PPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Posey, J. Favrot & Lamon* and *White and Robertson*, for plaintiffs and appellants. *Samuel P. Greves* and *A. S. Herron*, for defendants and appellees.

**TALIAFERRO, J.** The issues involved in this case, with the exception perhaps of one only, have been presented for the consideration of this court in two cases against the same defendants, at the suit of *E. Fendler*. See 19 An. 190 and 22 An. 239.

In this case the plaintiffs attack the account rendered to her children in 1861, the adjudication to herself at that time of certain property alleged to have belonged to her husband, and seek to have declared null, as simulated and fraudulent, the alienations and transfers of property made under sanction of the decree promulgating her account of tutorship.

It appears that *Gilbert Daigre*, husband of *Mrs. Mary Daigre*, one of the defendants, died in the year 1859. *Mrs. Daigre* became the tutrix of her minor children and in that capacity administered the

estate. She caused to be adjudicated to herself by due legal proceedings the property belonging to her minor children, and this adjudication was homologated in April, 1860. In March, 1861, she filed a provisional account of the tutorship and therein charged herself as indebted to her three minor children in the sum of \$31,879 each. In 1865 she filed her final account. In her petition she sets out that since the filing of her provisional account she has had no further account to render, and prays to be authorized to settle with the heirs on the basis of the provisional account. After due notice the account was homologated in May, 1865. By the exhibit made, the tutrix owed two of the children the sum of \$63,758, for which they held a special mortgage on the Mulberry Grove plantation, under the judgment of the court homologating the account Mulberry Grove was sold at probate sale and was bought by Gilbert and Lucy, the two heirs to whom she was indebted. The property brought \$23,000. In further satisfaction of the judgment Mrs. Daigre made a transfer of her interest in certain notes and movables amounting to \$16,735. Subsequently, in further satisfaction of the judgment, a house and lot in Baton Rouge was sold and brought \$1323, leaving a balance due of \$22,700.

The plaintiffs hold claims against Mrs. Daigre arising from obligations contracted by her in the year 1863. These claims were sued upon and judgments obtained upon them in 1865. The two sales and the transfer made in satisfaction of the judgment obtained by the heirs against Mrs. Daigre, took place early in August, 1865, and the plaintiffs' judgments were not rendered until the month of December following. This action to annul and set aside the various acts complained of by the creditors was not begun until the year 1870.

The creditors urge that the property they allege the defendant, Mrs. Daigre, sought to screen from their pursuit is more than sufficient to pay the whole amount she may justly owe the heirs upon a just settlement with them.

They allege that a large amount of the adjudication to the widow, in 1860, was illegally made up of the separate property of her husband which she had no legal right to have adjudicated to her. They also contend that a large part in value of the property of the community which was legally adjudicated to her was composed of slaves, and to the extent of their value she was under no obligation to pay the heirs anything.

The defendants make a general denial and plead the prescription of one year in bar of the plaintiffs' action to disturb the sales and transfer of the property they acquired in payment of their claims against Mrs. Daigre. There was judgment in favor of the defendants and the plaintiffs have appealed.

It is clear that the acts sought to be annulled and set aside in order

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 Lafttte et al. v. Mrs. M. C. Daigre et al.
 

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to subject the property transferred to the payment of the creditors are not simulated transactions. The plaintiffs indirectly admit the indebtedness of Mrs. Daigle to her children, growing out of the adjudication to her of their property in 1860, two or three years before she became indebted to the plaintiffs. At the time she filed her provisional account in 1861, she was wealthy, and if indebted at all to other persons than her own children, whose half of a large community estate unincumbered, she had acquired, the indebtedness was insignificant compared with the ample means she then possessed. The acts complained of are without doubt actual and real contracts, notwithstanding they may be fraudulent in the matter of running up fictitiously a larger indebtedness than really existed, in order to cover all the property of the debtor from the reach of the suing creditors.

The prescription of one year within which the revocatory action must be brought therefore prevails in this case against the plaintiffs. Civil Code, articles 1987, 1994, 1978. The simulated sale transfers no title, it is not a contract, a mere spectre, an empty shadow without substance, an airy nothing, presenting no barrier to the creditor in pursuit of his pledge, the property of his debtor. The actual though fraudulent contract is an impediment in his way which he is compelled to remove before he can continue his pursuit, and he must set about the work of removal within a year after it is interposed, otherwise the barrier becomes immovable.

The judgment of the lower court is correct, and it is therefore ordered that it be affirmed with costs.

Rehearing refused.

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No. 3715.—SUCCESSION OF H. JOHNSON—On Rule of EMILY HOFFMAN et als.

A particular legatee, as a general rule, can only claim interest on the legacy from the day the demand of delivery was made. R. C. C. 1626. But if, as in this case, the testatrix has fixed a day at which it becomes exigible, and the executrix charged with the execution of the will, which confers the legacy, has ordered its execution and has classed the legacy as a debt against the succession, then and in such case interest is due on the particular legacy from the date at which the testatrix has classed it as a debt.

**A** PPEAL from the Parish Court of Pointe Coupee. *A. Bouanchaud*, Parish Judge. *Edward Phillips*, for opponents. *F. H. Farrar*, for executrix.

HOWELL, J. Mrs. Johnson, wife of the late Henry Johnson, by her last will gave her whole estate to her husband, except certain legacies to the plaintiffs in this rule, to be paid after the death of her husband, whom she appointed executor without security, and who probated the will and took possession without making an inventory, as suggested in

the will. In his will he directed that the legacies made by his wife to the plaintiffs be paid by his executor as soon as practicable out of the first moneys collected of his estate. These legacies have been paid in principal, but the plaintiffs are claiming, in this proceeding, interest thereon from the date of Henry Johnson's death. The executor contends that these are particular legacies, on which interest can be claimed only from the date of a formal demand on him, which has never been made, and he cites articles 1626 to 1630 R. C. C. and 17 La. 312.

These articles would apply if plaintiffs were claiming from the succession of the donor, Mrs. Johnson, but they are claiming from the succession of Henry Johnson, who admitted the validity and binding form of his wife's will, and has directed its execution. He accepted the legacy to himself, with the charges and conditions imposed on it by the testatrix, and he has by his conduct assumed the payment of the particular legacies as debts at the time fixed by the said testatrix, to wit: the date of his death. They were, therefore, due at that date, and by law would bear interest from that date: C. P. 989.

No question of the legality or validity of the dispositions of Mrs. Johnson's will is raised. Her husband and universal legatee, as already remarked, has recognized their legality and ordered their execution.

Judgment affirmed.

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No. 3862.—FARMERS' AND MANUFACTURERS' AID ASSOCIATION *v.* E. D. STRAWBRIDGE et al.

The appeal will be dismissed on motion, if more than three judicial days pass, after the return day, before the record is filed in the appellate court.

**A**PPEAL from the Sixth Judicial District Court, parish of St. Tammany. *Ellis, J. J. M. Thomson*, for creditors and sheriff. *T. and J. Ellis and H. D. Ogden*, for defendants and appellees.

LUDELING, C. J. The motion to dismiss the appeal in this case must prevail. The return day for appeals from the parish of St. Tammany is the second Monday of February of each year. Acts of 1870, No. 44, p. 99. The second Monday of last month was the twelfth. This transcript was not filed until the twenty-eighth of February. More than three judicial days having elapsed after the return day, and the date of filing the transcript, the appeal must be dismissed. C. P. 587, 884; 3 An. 226; 21 An 212.

It is therefore ordered that the appeal be dismissed at the costs of appellants.

*Levi v. Corkern and Husband, Co-Administrators, et al.—Letchford & Co., Interveners.*

No. 3766.—A. LEVI v. CORKERN AND HUSBAND, Co-Administrators, et al., W. H. LETCHFORD & Co., Interveners.

The action for a separation of patrimony is prescribed by the lapse of three months.

**A**PPEAL from the Sixth Judicial District Court, parish of St. Helena. *Ellis, J. Fuqua & Kilbourne and McVea & Hunter*, for plaintiff and appellant. *T. & J. Ellis*, for defendants and appellees.

LUDELING, C. J. The plaintiff sued the administrators of the succession of H. Thompson and his surviving widow and heirs on two promissory notes executed by the deceased Thompson, and to revoke certain donations made to his child en during his life, and for personal judgment against the widow and children, Letchford & Co., who had a judgment against Thompson before his death, intervened in the suit and prayed for the same thing.

If this be regarded as a suit for a separation of patrimony, the prescription of three months must be maintained; if it be regarded as an action to revoke the sales before the death of the father, on the ground of fraud, they have failed to establish fraud. At the time the donations were made the father was perfectly solvent, and he continued to be solvent until his death. The evidence in the record shows that at the time of his death he had in his possession several thousand dollars, which were divided among the heirs after his death. The judgment against the widow in community and the heirs personally is correct. It is therefore ordered and adjudged that the judgment of the lower court be affirmed, appellants to pay the costs of this appeal.

No. 3817.—TOM BYNUM, Administrator, v. CAROLINE BYNUM, Administratrix.

The parish court has no jurisdiction in a contest between two successions, where one claims an amount of money from the other above five hundred dollars.

**A**PPEAL from the Parish Court, parish of Rapides. *H. L. Daigre*, Parish Judge. *R. J. Bowman*, for appellant. *R. A. Hunter and J. G. White*, for appellee.

LUDELING, C. J. The petition represents that Polycarp Lemothe died in 1859, leaving a plantation with a large number of mules, cattle and sheep thereon, and two thousand bushels of corn and seventy bales of cotton, all of which was taken possession of by Edith Lemothe as survivor and usufructuary. That Edith died in 1869 without accounting for the personal property. Petitioner claims that the land and property above mentioned was community property, and as the representative of Polycarp Lemothe's succession claims to be entitled to an undivided half of the land, which he prays may be partitioned

and for a judgment for the value of one-half of the said personal property against the succession of Edith Lemothe.

The defendant filed a plea to the jurisdiction of the parish court, which was sustained, and the plaintiff has appealed.

This is substantially a suit by one succession against another succession to recover real property, and for a judgment for the value of personal property, disposed of by the deceased widow, exceeding in amount five hundred dollars. The plaintiff's attorney insists that this case is similar to the case of *Pennisson v. Pennisson*, reported 22 An. 131, in which we held that the parish court had jurisdiction. The facts of the two cases are entirely different. In the latter case nothing was asked for but a partition of the property of the successions among the co-heirs themselves. In the present suit, the succession of Edith, Polycarp is sought to be made responsible for a large amount of money, the value of personal property, which she received and disposed of after the death of her husband. In the *Pennisson* case the contest was among the heirs alone; in the present suit, it is between the administrators of two successions. See 15 La. 456. *Badon's Heirs v. Faucher et al.* 16 La. 89; 8 R. 18; *Stewart v. Pickard*; Constitution, article 87.

It is therefore ordered that the judgment of the court *a qua* be affirmed with costs of appeal.

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No. 3773.—JOSEPH WETHEROW v. JESSE CROSLIN.

An attachment that has been granted on the oath of the creditor, that the debtor was about to convert his property into money, or evidences of debt, with intent to place it beyond the reach of his creditors, should not be dissolved on motion of the debtor, that the affidavit is false, if the evidence offered on the trial of the motion shows that the debtor was making an effort to sell his property, or place it out of his hands.

**A** PPEAL from the Thirteenth Judicial District Court, parish of Madison. *Hough, J. E. D. Farrar*, for plaintiff and appellant. *Welles & Rainey*, for defendant and appellee.

LUDELING, C. J. The plaintiff sued the defendant, on a promissory note, for six hundred and seventeen dollars and twenty-five cents, and he obtained an attachment against the defendant on the ground that he had reason to fear or believe that defendant was about "to convert his property into money or evidences of debt, with intent to place it beyond the reach of his creditors."

The defendant (without answering to the merits) filed a motion to dissolve the attachment, on the ground that the affidavit is false, "that defendant never made any attempt to dispose of his property, nor desired to do so at any time prior to filing this suit."

The motion was tried and the attachment was set aside. From this order the plaintiff has appealed.

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Wetherow v. Croalin.

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The defendant swore, on the trial, that he never offered to sell any of his property before the filing of this suit, nor did he tell any one he wanted to sell his property, etc.

The plaintiff, on the other hand, swore that he was informed by different parties that defendant had proposed to transfer his property to them to avoid paying his debts; that J. W. Clark was one of the persons who gave him this information, and that one Otis had exhibited to him a paper, whereby defendant had turned over to Otis some of his property. And Clark testified, "that sometime during last summer, previous to the seizure of the property of Jesse Croalin, defendant proposed to turn over to witness his property, stating as his reason for doing so, that he owed Mr. Witherow, plaintiff, and Mrs. Bauer, some money, and was unable to pay them at that time; that they were going to sue him, and he wanted to keep his property, but wanted to pay them."

It is manifest the judge of the court *a qua* erred in dissolving the attachment. C. P. 240.

It is therefore decreed that the order dissolving the attachment be annulled, and that the attachment be reinstated, and that appellee pay costs of this appeal.

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No. 3763.—M. A. EAST et al. v. H. A. EALER.

Movables, such as bricks in the kiln on a plantation, do not pass to the vendee by a sale of the land, unless it is so expressed in the deed of sale. A purchaser of a plantation who converts the bricks in the kiln to his own use, with the knowledge at the time of the purchase that they had been previously sold to another person by his vendor, is therefore liable to the owner for their value.

**A**PPEAL from the Fifth Judicial District Court, parish of East Feliciana. *Posey, J. Kilbourne & McVea*, for plaintiff and appellee. *Kernan & Lyons*, for defendant and appellant.

This case was tried by a jury in the court below.

HOWELL, J. On the fifteenth of September, 1866, the plaintiff purchased of Mrs. Nolan a brick kiln, containing about one hundred thousand bricks, on the plantation of the owner, in the parish of East Feliciana, with the right to remove them at pleasure—the delivery being acknowledged by the purchaser. In the following year the plantation with appurtenances was sold to F. Powers, who recognized plaintiff's ownership of the bricks, and hired her his wagons to remove a part of them. The plantation was reconveyed to Mrs. Nolan, who early in 1868 sold it with the appurtenances to H. C. Ealer, residing in St. Louis, Missouri. His agent and manager H. A. Ealer, the defendant, moved upon the plantation and conducted the planting operations.

During the year plaintiff sent teams to haul away the balance of the bricks, but was prevented by the defendant from doing so, whereupon this suit was brought for the value thereof. The defendant pleaded the general denial and alleged that at the date of filing the petition H. C. Ealer, who was the purchaser of the plantation and bricks, was dead. It appears, however, that before he filed his answer he had taken a title to the said plantation from the widow of the deceased, H. C. Ealer, and he filed no exception to the suit against himself. The act of sale from Nolan to Powers is similar, in the description of the property, to the one from Nolan to Ealer, and neither one makes any mention of the bricks, which, being movables, were therefore not conveyed by the said act. And there is evidence that defendant was aware that plaintiff had purchased them from Mrs. Nolan before she sold the land.

Under these circumstances the plaintiff is entitled to the value of the bricks which have been converted by defendant to his own purposes. A jury found for plaintiff.

Judgment affirmed.

NO. 3819.—ELIZABETH MANGUM *v.* W. A. BACON, Administrator, et al.

The widow, left in necessitous circumstances, has the right to recover from the succession of her husband one thousand dollars in preference to the mortgage creditors. In case she has already received a portion of this amount from the sale of personal property, it will be deducted from the one thousand dollars, and she will recover the balance.

**A**PPEAL from the Thirteenth Judicial District, parish of Carroll. *Hough, J. J. R. Leonard*, for plaintiff and appellant. *E. J. Deloney*, for defendant.

TALIAFERRO, J. Lane, Salter & Co. proceeded by order of seizure and sale against certain lands mortgaged to them by the plaintiff's husband, whose succession is administered by the defendant Bacon. The plaintiff, the widow of W. A. Mangum, comes in by third opposition, alleging that at the death of her husband she was left in necessitous circumstances, and she prays to be allowed one thousand dollars under the provisions of the law in such case provided. The mortgage creditors answered this demand, setting up various grounds to show that the plaintiff should not succeed in her opposition. The judge *a quo* found that the opponent had received of the personal property of the estate to the value of one hundred and twenty-eight dollars, and deducting that sum from one thousand dollars, he gave judgment in favor of the plaintiff. The creditors have appealed.

There is no error in the judgment. The claims of the plaintiff are clearly made out. It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, the appellants paying costs in both courts.



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Mary A. Wells and Husband v. Walker.

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No. 3769.—MARY A. WELLS AND HUSBAND v. C. W. C. WALKER.

In a sequestration suit the surety on the bond must reside in the parish where the process is taken out. The same rule applies in case of appeal. The surety on the appeal bond must, therefore, reside in the parish from which the appeal is taken.

**A**PPEAL from the Ninth Judicial District Court, parish of Grant. *Orsborn, J. W. B. Hyman and R. J. Bowman*, for plaintiffs and appellees. *R. A. Hunter*, for defendant and appellant.

**TALIAFERRO, J.** There is a motion to dismiss this appeal on the ground that the surety on the appeal bond resides in the parish of Rapides, and not in the parish of Grant, where the judgment appealed from was rendered. The parish of Rapides is within the Ninth Judicial District.

In cases of sequestration, it has been determined that sureties on bonds are by law required to be residents of the parish where the process is taken out. The same terms are used in the Code of Practice in regard to the sureties on appeal bonds that are used in reference to sequestration bonds, viz: that a surety shall be given "residing within the jurisdiction of the court." We think the same reasoning applies to both classes of sureties. *Eadem ratio, eadem lex.* 14 La. 245; 1 An. 306.

It is ordered that the appeal be dismissed.

No. 3827—J. WENTZ, Administrator, v. H. J. LEDOUX et als.

A sheriff who has been ordered to sell property and retain the proceeds subject to the further order of the court, must account for the proceeds whenever called upon. And the sureties on his official bond, who have subscribed as such before he is called upon to pay, are liable in case of failure of the sheriff to pay over the funds when demanded, although their liabilities as sureties was contracted since the sheriff came in possession of the funds which he was ordered to hold subject to the further order of the court.

**A**PPEAL from the Seventh Judicial District Court, parish of Pointe Coupee. *Miller, J. Farrar & Montgomery*, for plaintiff and appellee. *Edward Phillips*, for defendants and appellants.

**HOWELL, J.** This is an action against the sureties on a sheriff's official bond, to recover a sum of money which the said sheriff was judicially condemned, in certain proceedings against him as sheriff, to pay to plaintiff.

The sureties seek to escape liability on the ground that the funds in question came into the hands of their principal before the date of the bond signed by them, and that, as he claimed to be entitled thereto, and to retain the same prior to said date, the act complained of was committed before they undertook to insure his official faithfulness, their undertaking being for his future acts.

In March, 1868, he was ordered to sell certain property under seiz-

ure, and to retain the proceeds subject to the order of the court. The bond signed by the defendants is dated twenty-second July, 1868, and it recites that he (L. B. Dayries) was elected sheriff of the parish of Pointe Coupee, thus becoming his own successor, and charged with all the duties pertaining to the office. In 1870, legal proceedings were instituted against him as sheriff by the plaintiff, for the funds which he, as sheriff, had been ordered to hold subject to the order of the court, and he was condemned to pay over the sum claimed herein, being the amount of the proceeds of the property sold by him as sheriff, less his official charges. He therefore received these funds in the first place as sheriff, and after giving the bond signed by the defendants, he continued to hold them in the same capacity, and his failure to pay when demanded was a failure of official duty, while said bond was in force, for which his sureties for his official faithfulness are responsible. The fact that he had, during his previous official term, considered himself entitled to the whole of the proceeds of the property for costs, did not change the character in which he was holding them and in which, upon a hearing he was, during the present term, ordered to pay. The act complained of is his refusal to pay when legally called on.

There was no error in not permitting him to testify in this suit that prior to his election in 1868, he considered himself entitled to the whole of the money, as it was not pretended that he was condemned to pay more than he was legally bound to pay. The fact that he had set up such a pretension at that time, is no justification for his refusal to pay what the court subsequently ordered him to pay.

Judgment affirmed.

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No. 3649.—STATE OF LOUISIANA ex rel. THE BOARD OF SCHOOL DIRECTORS of the parish of Bossier v. THOMAS W. CONWAY, Superintendent of Public Education.

A judgment of a court making a writ of mandamus peremptory is a final judgment which can not be vacated or set aside by the judge *a quo* on a rule taken by the defendant in mandamus. Such judgment can only be annulled on appeal or by direct action of nullity.

**A** PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. Dennee & Belden*, for relators. *E. Filleul*, for respondent.

TALIAFERRO, J. In this case a peremptory mandamus was issued to the defendant by the Eighth District Court of New Orleans commanding the defendant to register and file certain bonds tendered by the treasurer of the Board of School Directors of the parish of Bossier and to issue to the Auditor of Public Accounts and to the treasurer of State the proper certificates according to law. He was further

State ex rel. Board of School Directors parish of Bossier v. Conway, Sup't Public Education.

ordered to recognize Lambert W. Baker, J. W. Walker, William M. Griffin, J. K. O'Neal and B. F. O'Neal as the persons legally constituting the Board of School Directors of the parish of Bossier.

No appeal was taken from this order, rendered on the seventeenth of October, 1871. On the seventh of December following the defendant Conway took a rule on the relators to show cause on the twelfth of that month why the order previously rendered against him at the instance of the relators should not be vacated and annulled. The relators excepted to the proceeding to annul the judgment or order making their mandamus peremptory by the summary proceeding by rule. On the trial of this rule the court sustained the motion to set aside and vacate the order, and from this judgment, annulling the peremptory order of the seventeenth of October, 1871, the relators have appealed. We think the judgment erroneous. The order is a final decree or judgment. We regard the summary proceeding on motion "to quash and vacate" a formal judgment of the court as anomalous and not in harmony with the jurisprudence of the State.

It is therefore ordered, adjudged and decreed that the judgment of the lower court, purporting to annul and set aside the peremptory order of the seventeenth of October, 1871, be annulled, avoided and reversed. It is further ordered that the defendant pay costs in both courts.

No. 3754—AMANDA R. RICHARDSON v. MRS. E. E. BARROW et al.,  
and LEHMAN, NEWGASS & CO. v. MRS. E. E. BARROW et al.

In this case the judgment creditors of the wife sought to enforce payment by a seizure and sale of her property. The husband brought suit by intervention, and alleged that the property under seizure was encumbered by a tacit mortgage in favor of his former wife and her heirs, to whom he was tutor; that during the former marriage he was the owner of the property seized; that he had received forty thousand dollars from his former wife of her individual funds, and had applied them to his own use for which he had never accounted, and the tacit mortgage attached to his property now under seizure. He further alleged his utter insolvency and asked that the proceeds of the sale of the property be paid to him as the tutor of his minor children by a former marriage, as their tacit mortgage on the property seized was superior to that of the suing creditors.

Held—That the tutor in order to pay a debt due by himself to his minor children (he being insolvent) could not be allowed to receive the proceeds of the sale of property subject to a tacit mortgage, to secure said debt.

APPEAL from the Seventh Judicial District Court, parish of West Feliciana, *Miller, J. Samuel J. Powell and Collins & Leake*, for tutor, opposing appellant. *Winter & Butler*, for the creditors.

LEDELING, C. J. Amanda R. Richardson and Lehman, Newgas & Co., having obtained judgments against Mrs. E. E. Barrow, were proceeding to execute their judgments when John J. Barrow, the husband of Mrs. E. E. Barrow, instituted the present suit. He avers that he is the tutor of his minor children by a former

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Richardson v. Barrow et al., and Lehman, Newgass & Co. v. Barrow et al.

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marriage; that he owed them forty thousand dollars as the heirs of his former wife, in consequence of having received forty thousand dollars belonging to her and used it for his own benefit; and that the property now in the name of his second wife, and against which her creditors are proceeding, was burdened with the tacit mortgage in favor of his first wife for the forty thousand dollars, as the same property had belonged to him. He avers that he is totally insolvent, and prays that the proceeds of the sale of the property be paid to him, as the tutor of his children, as the tacit mortgage before mentioned is superior in rank to that of the creditors of his second wife. This might be a convenient arrangement for him, but what would become of the security, studiously provided by the lawmaker, for the rights of the minors? To pay a debt due by himself to his children, he desires that the proceeds of property subject to a tacit mortgage to secure said debt be paid to him, the debtor, who is insolvent. It is the duty of courts to see that the rights of minors are not sacrificed, especially with their aid.

The judgment of the lower court rejecting the plaintiff's demand is correct.

It is therefore ordered that the judgment of the lower court be affirmed with costs of appeal.

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No. 3812.—SUCCESSION OF WM. C. JAMES—Opposition of McFEELY to the Tableaux of Debts.

In this case the wife became the executrix of her deceased husband's estate, and placed herself on the tableaux, filed by her, as a creditor for the amount of her judgment against her husband. This item on the tableaux was opposed by the creditors on the ground that the judgment was void because it had not been executed.

Held—That it being shown by the record that the judgment of the wife against her husband had never been executed, and that no proper effort to execute it had ever been made; that therefore it was absolutely void, and not properly placed upon the tableaux as a debt against the succession.

In the same tableaux the executrix refused to place a judgment against her husband upon the tableaux as a creditor, on the ground that it involved a slave consideration. The record of the case in which the judgment was rendered being introduced showed that the plea of a slave consideration had been made, but the proof offered failed to establish it.

Held—That the judgment was properly ordered by the judge *a quo* to be placed upon the tableaux as a debt against the succession.

**A**PPEAL from the Parish Court, of Rapides. *Daigre, J. Ryan & White*, for plaintiff and appellant. *R. A. Hunter*, for opponent and appellee.

**TALIAFERRO, J.** The widow and executrix filed a tableaux of debts of the succession, placing upon it her judgment against her husband for \$7600, with legal mortgage from the twenty-third of October, 1865. This judgment was opposed on the ground that after obtaining the judgment no ulterior means of any kind were used to enforce it, and that it became a nullity.

## Succession of James.

The executrix refused to recognize McFeely's judgment as a debt against the estate on the ground that it arose from a slave obligation and to the refusal of the judge to hear evidence to that effect, the executrix reserved a bill of exceptions. The judgment of the parish court ordered McFeely's judgment to be homologated as a valid debt against the succession, and rejected the judgment of the executrix as null and without effect. The record of the suit of McFeely v. James, the one in which McFeely obtained against James the judgment which the executrix refused to acknowledge, appears in the record. Evidence in that case was introduced to prove that the note was given for the price of a slave, but it failed to establish the fact.

There was proof in regard to the wife's judgment that it was rendered in 1865, and that no execution had ever issued upon it nor any means used to enforce it. The succession is shown to be utterly insolvent. We see no reason for remanding the case, as we think the judgment was properly rendered.

It is therefore ordered that the judgment appealed from be affirmed, the costs of appeal to be borne by the succession.

## No. 3789.—A. AND ED. B. TALBOTT v. THE PARISH OF IBERVILLE.

As a general rule a parish can not, through its police jury or otherwise, contract a debt or incur an obligation binding upon it without at the same time providing the means of paying such debt; but if the parish is involved in heavy litigations, the police jury have the right to contract with experienced attorneys, in addition to their regularly paid attorney, to aid in the defense of such suits, and the parish is legally bound for the payment of their fees.

**A** PPEAL from the Fifth Judicial District Court, parish of Iberville. *Posey, J. A & E. B. Talbott, in propria personæ, and Elmore & King* for plaintiffs. *Breaux & Fenner and Hall and George Wailes*, for defendant and appellant.

**TALIAFERRO, J.** The plaintiffs bring this action upon a written contract entered into between them and the president of the police jury of the parish of Iberville, acting on the part of the latter, whereby the plaintiffs, as attorneys at law, were engaged to render certain specified professional services for the parish, for which they were to be paid \$3600; six hundred dollars of which were to be paid in cash, the remainder to be contingent upon the final termination of certain suits then pending in the courts against the parish; the plaintiffs to receive the whole amount in the event the cases should be finally decided in favor of the parish. The cash payment was made, but the remainder being withheld the plaintiffs instituted this suit, alleging that they have rendered the stipulated services, that they have conducted the defense of the causes to a successful termination in favor of

the parish, and therefore pray judgment for \$3000 in conformity with the contract, and for legal interest from twenty-seventh of March, 1871.

The answer is a general denial. Several grounds are set up in defense. These are that Dubuclet, the president of the police jury, was without authority to contract the obligation declared upon. That the parish had its own attorney who received a salary from the parish, and whose duty it was to attend to all the legal business of the parish; the employment of other attorneys being improper and illegal.

The plaintiffs had judgment for the amount claimed, and the defendant has appealed.

The only grounds urged in opposition to this claim that we deem it necessary to consider, is that police juries are corporate bodies of special and limited powers which are to be strictly construed, and that they are by statute prohibited from contracting debts without "fully providing in the ordinance creating the debt the means of paying the principal and interest of the debt so contracted." Revised Statutes, section 2786. Section 2743, Revised Statutes, confers upon police juries the right "to lay such taxes as they may judge necessary to defray the expenses of their respective parishes."

The only question to consider here is whether in providing for expenses of the parish the police jury was authorized to provide for the payment of the attorney's fees in question as a part of the necessary current expenses of the parish, and to determine this question we must advert to the facts and circumstances existing at the time. Suits for various sums, amounting in the aggregate to over forty thousand dollars, were instituted against the parish, which the police jury judged it important to the parish to defeat. To this end it was deemed prudent to employ able and experienced counsel to aid the parish attorney in the defense of these cases. The parish, as a political corporation, acting through the members of the police jury as their agents, was clearly competent to use the ordinary legal means of defense when assailed by parties seeking to enforce against the parish heavy debts and liabilities. There was nothing to prohibit the corporation from employing other attorneys in aid of its own in defense of law suits which might seriously affect the interests of the people of the parish. The discretion to do so we think can hardly be questioned. The compensation to counsel so employed may fairly be considered a contingent expense, and properly ranked among other current expenses which the police jury is authorized to provide for. An estimate of expenditures for the year ending June, 1871, was made and adopted by the police jury on the eighth of September, 1870; one item in this estimate is "for lawyer's fees, as per contract of late police jury, \$10,000." Several ordinances are found in the record, one of them showing the authorization of the police jury to Dubuclet to engage counsel;

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another, the ratification of his contracts with the plaintiffs and the late Hon. Zenon Labauve, as counsel for the purpose required, and a third directing the payment of the six hundred dollars cash to the plaintiffs. The contract entered into with the plaintiffs is dated the tenth of January, 1870. There was an ordinance passed the second of January, 1871, repealing the one approving and adopting the estimates of September 8, 1870. This could have no effect on the obligation of the parish to the plaintiffs, who had contracted and rendered their services previously.

There are two bills of exceptions in the record, but their examination is not called for in the decision of the case.

For the reasons assigned, it is ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

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No. 3735.—WEBSTER & CO. v. ROSS E. BURKE.

The testimony of one witness to the correctness of an account, above five hundred dollars, is sufficient to confirm a judgment by default. 4 Rob. 258; 10 An. 270.

**A**PPEAL from the Ninth Judicial District Court, parish of Natchitoches. *Orsborn, J. J. F. Smith*, for plaintiffs and appellees. *Pierson & Levy*, for defendant and appellant.

**TALIAFERRO, J.** The plaintiffs sue on an account for supplies furnished, amounting to \$652 79, with interest from nineteenth November, 1870. The defendant was duly cited, a judgment by default regularly taken and afterward final judgment rendered. No defense was made. A witness introduced by plaintiffs testified that the defendant admitted to him that the debt was due and unpaid. There was judgment as prayed for by the plaintiffs and a third party has appealed. The appellant alleges that he is a creditor of the defendant and also his assignee and charged by him with the administration of his property for the benefit of his creditors. That the judgment confers an unjust preference in favor of plaintiffs over the other creditors of the defendant, and that he is interested in having the judgment annulled and set aside. He avers that the judgment was rendered upon sufficient evidence.

We see nothing in the defense set up in this court. It has been long settled that a judgment by default is a sufficient corroborative circumstance with the testimony of one witness to establish a claim amounting to more than five hundred dollars. 7 La. 181; 4 Rob. 258; 10 An. 270.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

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Mrs. A. LeBlanc, Wife, etc., v. Mrs. R. Dayries and Husband et al.

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No. 3770.—MRS. A. LeBLANC, Wife, etc., v. MRS. R. DAYRIES and Husband et al.

Where a judgment of separation of property has been executed or partially executed by the husband giving to the wife in payment thereof certain real estate within a reasonable time after its rendition, a creditor of the husband can not maintain a seizure of the property thus given in payment or part payment of the wife's judgment of separation, on the ground that such judgment is void for want of prompt execution thereof. In such a case the wife having established the validity of her judgment, and her title to the property, which she acquired from her husband in payment thereof, is entitled to an injunction to stay the sale of her property in payment of her husband's debts.

**A**PPEAL from the Seventh Judicial District Court, parish of Pointe Coupee. *Miller, J. A. L. Mohondeau* and *O. R. Schmidt*, for plaintiff and appellant. *Collins & Leaks*, for defendants and appellees.

HOWELL, J. In May, 1866, the plaintiff obtained judgment against her husband, J. D. Lacour, for separation of property and the sum of over \$14,000. Soon afterward it was credited with the sum of \$5700, amount of a notarial transfer of certain lands by the husband to the wife in part satisfaction thereof. In March following the husband made another notarial *dation en paiement* of certain notes and movable property in further satisfaction of said judgments. Among said notes was one made by Mrs. C. M. Lacour as principal and O. Lejeune, Jr., as security *in solido* for \$1100, secured by mortgage. The note was lost or destroyed, and the maker gave an acknowledgment thereof to the plaintiff, Mrs. A. Lacour, with a confession of judgment in her favor. On this instrument a writ of seizure and sale was taken out in the name of J. D. Lacour the husband, whereupon the defendant, Mrs. Dayries, caused a seizure thereof to be made by the sheriff under a *fi. fa.* against said J. D. Lacour, and the plaintiff enjoined the sale, claiming to be owner of the property seized, and from a judgment against her she has appealed.

The first ground urged by defendant for affirming the judgment is that the judgment of Mrs. Lacour against her husband is a nullity for want of prompt and *bona fide* execution, as provided by article 2428 R. C. C.

The record does not sustain this position. Within a month of its rendition this judgment was partially satisfied, as shown by the credit thereon. This is not assailed. The next proceeding was the transfer, in March following, 1867, about ten months after the date of the judgment, of the notes, etc., including the claim in controversy. These two acts are authentic, and were duly recorded, and they seem to have been a timely execution of the wife's judgment by the payment, in that mode, of her rights and claims, as far as the estate of the husband could meet them. R. C. C. 2428. It was not until more than a year after the date of the second act, and after the attorney had by mistake, as he states in the first petition of injunction brought suit on the claim



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in question in the name of the husband, that the defendant endeavored to enforce her judgment against the latter.

The second and third grounds are that the note in dispute was never delivered to Mrs. Lacour and notice thereof given to the debtor.

The instrument on which the writ of seizure and sale was issued, on the petition of the husband, shows that the note belonged to the wife and notice thereof had been given to the maker, for she therein confessed judgment in favor of the wife.

We think the plaintiff has satisfactorily established her ownership of the property seized by the defendant and her right to a perpetual injunction, with one hundred dollars for attorney's fees as damages.

It is therefore ordered that the judgment appealed from be reversed, and that plaintiff be decreed to be the owner of the property seized in the suit of *Rosa Porche v. W. L. Brown et al.*, No. 505, and that the injunction herein be perpetuated, and said Rosa Porche, wife of Edward Dayries, be condemned to pay plaintiff one hundred dollars damages with costs in both courts.

#### No. 3676.—SUCCESSION OF SAMUEL WEIL—Opposition to Account of Administrator.

An indorsee or holder of a promissory note may recover thereon from the indorser, although the note itself was given for a slave consideration, and its enforcement against the maker is prohibited by article 128 of the Constitution. This right to recover from the indorser is based on the principal that every indorsement of a promissory note forms a new contract between the indorsee and the indorser.

**A** PPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. J. Ad. Rozier*, for appellants. *T. Gilmore & Son*, for opponents and appellees.

WYLY, J. The motion to dismiss the appeal can not prevail, the judgment not being acquiesced in as alleged, and the appeal being taken within one year from the signing of the judgment.

W. H. Letchford & Co. appeal from the judgment of December 11, 1871, dismissing their opposition to the account of the administrator on the ground of the alleged slave consideration of their claim.

The pleadings are somewhat irregular, and several questions are presented for adjudication; but the only one of any importance is the charge that the claim of the opponents is founded upon a slave consideration, and under article 128 of the Constitution can not be enforced, notwithstanding it was put into a judgment prior to the Constitution of 1868.

It is true the consideration inuring to the makers of the note was slave, but that moving between the indorser, Samuel Weil, and the indorsees, W. H. Letchford & Co., was not slave.

It is true W. H. Letchford & Co. sued the makers and indorsers of

the note in the Twelfth District Court, parish of Ouachita, and they confessed judgment on April 16, 1866.

It is also true the makers of the note have successfully resisted the execution of the judgment in consequence of the slave consideration of the note on which it was founded.

Samuel Weil was held bound and condemned to pay W. H. Letchford & Co., not on the original contract evidenced by the note, but on his contract with them arising from the indorsement.

It is well settled that every indorsement is a new contract, which imposes a conditional obligation on the indorser in favor of the indorsee. It was this agreement which was enforced against Samuel Weil in the judgment of April 16, 1866, in the Twelfth District Court.

Now this judgment can not be treated as an absolute nullity. It is in no wise affected by article 123 of the Constitution, declaring that "contracts for the sale of persons are null and void, and shall not be enforced by the courts of this State."

The court below seems to have based its judgment, rejecting the claim of W. H. Letchford & Co., on the case of *Groves v. Clark*, 21 An. 567, where it was held that an indorsee, before maturity, could not recover against the maker of a note given for the price of slaves.

That decision does not support his judgment. There the maker was pursued upon his obligation, the consideration of which was the price of slaves, and article 128 of the Constitution was held to be applicable, because the only obligation contracted by the maker of the note was to pay the amount thereof.

Here the indorsees, W. H. Letchford & Co., had judgment against Samuel Weil on his contract of indorsement, the consideration of which was slaves. This contract may be enforced and article 128 of the Constitution not violated.

In reference to the position that the administrator has turned over the property of the succession to the natural tutrix and taken her receipt, we will remark that this was an idle ceremony.

No agreement or collusion between them can defeat the judgment creditors of the deceased, or place the property beyond the jurisdiction of the court and the administration.

It is therefore ordered that the judgment of December 21, 1870, recognizing W. H. Letchford & Co. as judgment creditors be affirmed; and it is ordered that the judgment of December 11, 1871, dismissing their opposition be annulled, and it is ordered that the account filed by the administrator on June 7, 1871, be set aside as informal and illegal, and that the administrator render his account and proceed to the settlement of the succession according to law. It is further ordered that the costs hereof be paid by the succession.

Rehearing refused.

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Widow L. Delacroix v. Mary M. Hart—Martha J. Barrow, Garnishee.

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No. 3786.—WIDOW L. DELACROIX v. MARY M. HART—MARTHA J. BARROW, Garnishee.

A garnishment process is a suit, and the garnishee must be brought before the court by citation. A judgment against the wife as garnishee can not, therefore, be rendered unless she has been first authorized by her husband or the judge to appear and defend the suit.

**A**PPEAL from the Fifth Judicial District Court, parish of Iberville. *Possey, J. Samuel Matthews*, for plaintiff. *Barrow & Pope*, for garnishee, appellant.

LUDELING, C. J. The plaintiff having issued an execution against the defendant, filed a petition praying that M. J. Barrow be cited to answer interrogatories propounded to her, and for a judgment against her according to law. He prayed that her husband might also be cited to aid and authorize her to act in the suit.

No citation was addressed to the husband, but the wife alone was cited. She appeared, to file a plea to the jurisdiction of the court *ratione materiæ*, which was properly overruled.

Martha J. Barrow having failed to answer the interrogatories, on motion they were taken for confessed, and a judgment against her was accordingly rendered. On appeal, the judgment in this case was set aside on the ground that the wife had not been authorized either by her husband or the court, and the case was remanded to be proceeded with according to law. The plaintiff then obtained the authorization of the court for her to defend the suit, and then judgment was taken against her.

It is now contended that the court could not give the authorization, as the husband was not absent nor had he refused to authorize her; that he had never been cited, as the law requires, and therefore his wife was not properly in court. These objections seem well founded in law. In *Henry v Brice*, 11 An. 691, it was said that it is only when the answers of the party garnished are traversed, that the proceedings partake of the character of a legal controversy; and it is there intimated that the wife, in a case where the answers are not traversed, or where she fails to answer, need not be authorized by her husband, or the court. But the garnishment process is certainly a suit; there must be a petition and citation to get the garnishee before the court, and then follows a judgment in accordance with the evidence. If the garnishee confesses that he or she is indebted, either expressly or by making default, a judgment will be entered up against the party so confessing. The wife can not bind herself by a contract without the authorization of her husband; neither can she be sued without citing her husband to authorize her to defend the suit. How, then, can she confess judgment without the authorization of her husband, either expressed or implied? This litigation, on the part of the garnishee,

Widow L. Delacroix v. Mary M. Hart—Martha J. Barrow, Garnishee.

seems to be only for delay; but we have no right to disregard the law. Article 118, C. P., declares, "When one intends to sue a married woman, for a cause of action relative to her own separate interest, the suit must be brought against her and her husband. Should her husband be absent, the plaintiff must demand that she be authorized by the judge before whom the suit is brought. C. P. 206; 2 An. 281; 9 An. 197; 1 An. 260. There is nothing in the record to show that the husband was absent.

It is therefore ordered and adjudged that the judgment of the district court be reversed, and that the case be remanded in order that the husband of the garnishee may be cited according to law. It is further ordered that the appellee pay the costs of this appeal.

No. 3746.—CARROLL, HOY & CO. v. ANN C. MANNING and her Husband.

The wife, whether separated in property from her husband or not, can not bind herself for his debts, nor can she bind herself conjointly with him for debts contracted by him before or during the marriage. 14 An. 700; 21 An. 525.

is incumbent upon a person who has contracted with a married woman, if he wishes to hold her, to see that the proceeds of the obligation she contracts inures to her separate advantage. 1 An. 428; 7 An. 293.

**A**PPPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. B. A. Hunter*, for plaintiffs and appellants. *James G. White*, for defendants and appellees.

LUDELING, C. J. The plaintiffs sued the defendant, a married woman, on a promissory note, of which the following is a copy:

"\$4,957 46.

COTILE, La., July 1, 1867.

Six months after date we, or either of us, promise to pay to the order of Carroll, Hoy & Co., at the Canal Bank, in New Orleans, La., forty-nine hundred and fifty-seven dollars and forty-six cents, for value received, with interest at the rate of eight per cent. per annum after maturity until paid.

A. C. MANNING.

J. F. MANNING."

The plaintiffs alleged that the note was given for moneys advanced and supplies furnished for the benefit of the defendant, for her separate advantage and for the improvement of her paraphernal property.

The defense is, that the debt for which the note was given was an obligation of the husband, contracted by him in his planting operations, in which she had no interest, and that she did not receive any separate advantage therefrom, etc.

There was judgment for the defendant, and the plaintiffs have appealed. The evidence discloses the following facts: That the note given was for an account created by Dr. Manning in cultivating the plantation belonging to the succession of Meraday Neal; that the de-

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 Carroll, Hoy & Co. v. Ann C. Manning and her Husband.
 

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fendant was the administratrix of the succession and tutrix of her minor children; that the succession was not closed, and that it owed debts, and that an undivided one-fourth of the residue of the property of the succession, after paying debts, will belong to the defendant; that she is not separated in property from her husband. There is no proof that any improvements were placed upon the property of the estate, with the moneys received, nor that the moneys advanced or supplies furnished were for her separate advantage. Under this state of facts it would seem that the debtor was Dr. Manning and not his wife, and that in signing the note she was binding herself for his debt. It is for those who treat with a married woman to be on their guard and see that the obligation she contracts inures to her separate advantage. *Brandegee v. Kerr and wife*, 7 N. S. 64; 10 La. 146; 4 R. 508; 2 An. 579; 5 An. 595; 1 An. 428; 7 An. 293. But in this case the debt does not appear to have been created by the wife—she signed the note, which was for an account created by her husband for his benefit. The law forbids the wife from making such a contract. “The wife, whether separated in property by contract or by judgment, or not separated, can not bind herself for her husband, nor conjointly with him, for debts contracted by him before or during marriage.” C. C. art. 2398; 12 An. 725; 14 An. 700; 21 An. 525.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed with costs of appeal.

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No. 3302.—WM. A. BURNETT v. B. B. CLENEY—W. F. WITHERELL,  
Intervenor and Appellant.

The lessor has a right of pledge on the movables on the plantation leased to secure the payment of the rent, which it is not necessary to have recorded in order to give it a preference over the privilege allowed by law to the purchaser of supplies.

**A**PPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Posey, J. Fuqua & Callihan*, for plaintiff and appellee. *S. P. Greves*, for intervenor and appellant.

HOWE, J. We see no error in this judgment. The intervenor claimed a privilege as furnisher of supplies to a plantation. The plaintiff claimed a privilege as lessor of the plantation. The judge *a quo* decided the contest in favor of plaintiff and rejected the demand of the intervenor for a concurrent privilege, on the ground, among others, that his privilege was not recorded in such way as to have effect against the plaintiff.

We consider it settled that the plaintiff's privilege, or more strictly, right of pledge, does not require to be recorded, but that the intervenor's does.

Judgment affirmed.

## No. 3729.—JAMES MILLIGAN v. DAVID M. LYLE.

A person who has been acting as agent for another, can not be held personally liable for a draft which he has given in favor of a third person, if the consideration for which the draft was given inured to the benefit of his principal, especially if it be shown that the payee of the draft knew at the time he took it that the drawer was only acting as agent or overseer for another; the agent would be still less liable if the draft itself showed on its face that it was not to be charged to the drawer, but to be charged to the account of his principal.

**A** PPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. J. G. White*, for plaintiff and appellant. *E. A. Hunter*, for defendant and appellee.

LUDELING, C. J. The plaintiff sues the defendant on the following instrument:

“WELLSWOOD, March 12, 1867.

“Messrs. Darby, Mouton & Co.:

“Sir—Please pay to the bearer, James Milligan, the sum of five hundred and seventeen dollars and fifty cents, for ditching on Wellswood plantation, and charge the same to John N. Lyle's account.

Oblige, yours,

DAVID M. LYLE.”

This instrument was given by the defendant, overseer of the Wellswood plantation, cultivated by his brother John N. Lyle and Montfort Wells.

The plaintiff's own testimony shows that, before he went to work on the Wellswood plantation, he had been ditching for the sons of Montfort Wells, in the neighborhood; that he knew that Montfort Wells lived on the Wellswood plantation; that he and other workmen went there to see General Wells to get work; that they were sent by General Wells to D. M. Lyle, who put them to work, and plaintiff declares that he “did not know D. M. Lyle was anything more than a manager on the Wellswood plantation.”

James Reagan swears that he worked on the Wellswood plantation; that the plaintiff was at work there before he went there; that for the work done by him David M. Lyle gave him a draft, signing the name of J. M. Lyle, which was paid.

David M. Lyle swears that he was only overseer on the plantation; that he never pretended to be anything else; that at the time he gave the draft he explained to the plaintiff how the draft was drawn, and that the crop on the place was bound for the debt; that he tried to explain to him that the draft was John N. Lyle's, and not his; and that he never received any consideration for the draft sued on.

General Wells testified as follows: “When, or just before the plaintiff was employed on the place, the defendant in this suit came and asked me if the plaintiff should be employed on the plantation to do some ditching. I told him it was needed on the plantation, and to engage the plaintiff to do it. The defendant Lyle was nothing more than an overseer on the plantation. The plaintiff had been

ditching on the Lodi plantation, for my sons, before he came to Wellswood. My sons sent him to me after he had finished with them." He further states that "David N. Lyle was the manager and overseer, and agent on the place of John N. Lyle. He contracted and paid debts, which his brother recognized. The plaintiff, Milligan, knew witness quite well, and knew that he owned the Wellswood plantation, and that the Lyles did not. He also knew that witness was interested in the crop and its cultivation, at the time he worked there. He was also acquainted with John N. Lyle, the other partner, at the time he worked there. It was generally known that David N. Lyle was nothing more than a manager and overseer on the plantation."

Thus it is shown that the defendant has acted throughout this transaction as an agent; and that the plaintiff knew this. His failure, therefore, to add *agent* after his signature is not material. 3 M. 642; 10 La. 388; 3 R. 378; 12 R. 16; 18 An. 113; 21 An. 223. But we think the agency of the drawer is apparent on the face of the draft. He says, "Charge the same to John N. Lyle's account." This clearly negatives the idea that it should be charged to him. The case of *Moher et al v. Overton* (in 9 La. 115), is directly in point. It is clear that David N. Lyle never received any consideration whatever for the draft. It is stated on the face of the draft that it was for ditching on the Wellswood plantation, with which he had no connection, except as an overseer. Nor is it proved that credit was given to him. Even if he had exceeded his authority in giving the draft, under the impression that he had the right to do so, we do not think, under the circumstances of this case, that he would have rendered himself responsible; certainly not on the draft. *Parsons' Mercantile Law*, 147.

It is therefore ordered and adjudged that the judgment of the district court be annulled and that there be judgment in favor of the defendant for costs in both courts.

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No. 3740.—H. DUCOTE v. F. BORDELON et als.

The fact that the notary who took an inventory of a succession failed to cite the tutor to the minor heirs, is not a good ground for injoining the sale of the succession property to pay its debts.

**A**PPEAL from the Parish Court, parish of Avoyelles. *S. R. Thorpe*, (attorney-at-law), judge *ad hoc*. *Edwards & Ducote*, for plaintiff. *Waddill & Barbín*, for defendants.

**W**ILY, J. The plaintiff, who for a time administered the succession of Eliza Rabalais in his capacity of tutor of her minor heirs, enjoins the sale of the property of said succession provoked by the present administrator, F. Bordelon, to pay debts, on the ground that the appointment of the latter was not regular.

Ducote v. Bordelon et als.

*First*—Because legal notice of his application for the appointment was not given and made.

*Second*—Because the inventory was not legally made, the plaintiff, the tutor, not being cited to be present at its taking.

*Third*—Because a creditor in a fiduciary capacity can not demand the appointment of an administrator when the estate is being administered by the surviving husband as natural tutor. The court gave judgment for the plaintiff perpetuating the injunction, and the defendants have appealed.

Whenever it is necessary to protect their rights the creditors may demand the appointment of an administrator to manage the succession and when the application is pending for the appointment of an administrator, is the time for those claiming preference to assert their rights. The tutor who has been administering the estate can not defeat the right of the creditors to cause a regular administration of the estate to be opened. That the notary neglected to cite the tutor at the taking of the inventory, is no ground to enjoin the sale of succession property to pay debts.

The notice of the application of the defendant, F. Bordelon, to be appointed administrator, we deem sufficient.

Let the judgment appealed from be annulled, and let the injunction herein be dissolved at plaintiff's costs in both courts.

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No. 3790.—J. H. RILLS v. PARISH OF IBERVILLE.

The law which creates the office of parish attorney and authorizes the police juries to fix the salary and emoluments thereof, does not prohibit the police juries from making a contract for increased or extra compensation in particular cases. A contract with the parish attorney for extra compensation is therefore valid and binding upon the parish.

**A**PPEAL from the Fifth Judicial District Court, parish of Iberville. *Posey, J. Barrow & Pope*, for plaintiff and appellee. *George Wailes and Breauz & Fenner*, for defendant and appellant.

HOWELL, J. The plaintiff, as district attorney *pro tem.* for the parish of Iberville, claims of the said parish six thousand and ninety-five dollars as professional fees for successfully defending the parish in six several suits, involving large amounts. Three thousand dollars of said sum are claimed under a special contract as "additional fees," and three thousand and ninety-five dollars as the five per cent. on the total amount involved in said suits, allowed by the law creating his office. The answer denies the instrumentality of plaintiff in the success in said suits and his right of action against the defendant, and also the legality and validity of the resolution of the police jury authorizing the special contract with plaintiff, "because the parish was fully and ably represented at the time by authorized and compe-



tent counsel, and the employment or pretended employment of said Rills was futile and unwarranted."

When the first of the said six suits was instituted, the police jury adopted a resolution authorizing their president "to engage additional counsel to assist J. Hamilton Rills, parish attorney, in the defense in the case to final decision before the Supreme Court, and to allow said parish attorney additional fees, and to agree on such fees as he may think proper and on such conditions as he may deem proper, taking into consideration the importance and the aggregate of all bonds involved;" their amount being over \$35,000, with eight per cent. interest. Accordingly the president employed Messrs. Zenon Labauve and A. & E. B. Talbot, at certain stipulated fees, and agreed to allow plaintiff "as additional fees to attend and defend the suit of Emile L. Breaux v. the Police jury of Iberville to final decision before the district and Supreme Court, one hundred dollars unconditional, to be paid before the case goes up to the Supreme Court, and three thousand dollars besides and exclusive of the said one hundred dollars, if a judgment be rendered in favor of said police jury." The president reported his action to, and it was approved and ratified by, the police jury. The amount claimed in said suit was \$1518 20 with eight per cent. interest, for about fifteen months. The plaintiff defended the suit, and judgment was rendered in the Supreme Court in favor of the police jury. By the statute creating the office of plaintiff and the resolution of the police jury in relation to the subject, his salary was fixed at \$500 per annum, and five per cent. commission on any amount he may recover in any suit in favor of said parish, and a fee of five per cent. on the amount for defending any suit in which said parish is defendant, to be paid by the parish. See R. S., sec. 1186. This law authorized the police jury to require the services of the plaintiff as the attorney of the parish, and to pay him a salary not less than one hundred dollars per annum, "and as much more as the police jury may fix, out of the treasury of such parish quarterly," on his own warrant, and the commissions as above stated. The police jury fixed the annual salary at \$500, as already mentioned.

It is contended that under this law and the principle announced in *Heistand v. New Orleans*, 14 An. 330, and *Mandell v. New Orleans*, 21 An. 9, it was incompetent for the police jury to make the contract with plaintiff for the additional fee of \$3100.

In the cases cited it was held that the officer must be considered as having accepted office with reference to the legislation regulating the duties and the emoluments of the office which he accepted. If no special agreement had been previously made, this doctrine could be successfully invoked against plaintiff for any claim in addition to the compensation fixed; but we are not prepared to say that the law

amounts to a prohibition to the police jury to make a contract for increased or extra compensation in particular cases. And if the police jury have power to make such contracts, the wisdom or improvidence of its exercise is not within the control of the courts. 12 An. 554, 14 An. 69.

The reason set up in the answer is not a sufficient one to declare the contract "futile and unwarranted." Plaintiff is, hence, entitled to the \$3000 additional fee.

In the various suits defended by him, judgments were rendered in the district court against the parish for an aggregate of about \$35,663 48 in principal, with eight per cent. interest, for an average of about four years. These judgments were reversed in the Supreme Court, which released the parish from a liability of about \$47,000; the five per cent commissions on this sum are \$2350, for which plaintiff is entitled to a judgment on the prayer filed in this court, instead of \$1570 90 allowed by the lower court.

It is therefore ordered that the judgment appealed from be increased from \$4570 90 to \$5350 with the interest allowed, and that as thus amended it be affirmed with costs of appeal.

No. 3590.—STATE ex rel. A. HERO, JR., v. J. L. LARESCHÉ.

The fact that a person is a notary public does not of itself entitle him to the custody or control of the records of a deceased notary. Such person is not, therefore, entitled to an appeal from an order of the judge *a quo*, directing him to deliver the records of the deceased notary to the proper officer designated by law to receive them. An oath of such notary that he has an interest in retaining possession of the records of the deceased notary above five hundred dollars is not sufficient of itself to vest the appellate court with jurisdiction of the appeal.

**A** PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. Horner & Benedict*, for relator, appellee. *J. A. Dejean*, for respondent.

HOWELL, J. A motion is made by relator to dismiss this appeal because defendant has no appealable interest in the controversy.

It is a proceeding by mandamus by the custodian of notarial records, of the parish of Orleans, to obtain possession of the notarial records of Paul E. Laresche, deceased, withheld by his son, the defendant, who simply asserts that he holds them because he is a notary public, and the relator is not entitled to the custody thereof. He discloses no pecuniary interest whatever in the said records, notwithstanding his affidavit to the effect that his interest exceeds \$500.

His being a notary public does not entitle him to any property in or control over the records of a deceased notary.

It is therefore ordered that the appeal herein be dismissed, with costs.

## No. 3848.—DENNIS REDMOND v. B. L. MANN et al.

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If a suspensive appeal has been dismissed because the appellant has failed to file the record in the appellate court within three judicial days after the return day, he can not afterward be allowed to take a devolutive appeal from the same judgment. 4 An. 30; 9 An. 39.

**A** PPEAL from the Sixth Judicial District Court, parish of Tangipahoa. *Ellis, J. T. & J. Ellis*, for plaintiff and appellee. *Race, Foster & E. T. Merrick*, for defendants and appellants.

LUDELING, C. J. A motion to dismiss this appeal has been made on the grounds, that having taken a suspensive appeal and having failed to file the record seasonably, the appellant can not take a devolutive appeal, after the dismissal of the first appeal.

The first appeal was dismissed, because the record was not filed, until more than three judicial days after the return day. The appellant contends, however, that inasmuch as the appeal was dismissed on motion of the appellee, it can not be said that the appellant abandoned his appeal, and therefore the right to a devolutive appeal may still be exercised. We can not assent to this proposition. "When a party fails to take the necessary steps to prosecute his appeal, he will be considered as having abandoned it, in the sense and meaning of article 594 of the Code of Practice, and will not be allowed to renew it." 1 R. 100. "When a suspensive appeal has been dismissed on account of the failure to file the record within three judicial days after the return day, the appellant can not afterward take a devolutive appeal from the same judgment." 4 An. 30, *Ducannau v. Levistones*, 3 An. 245; 4 La. 41; 9 An. 39.

It is therefore ordered that the appeal be dismissed with costs.

## No. 3565.—LOYAU BERTIL v. G. G. FISK.

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The district attorney of a district may, in case of refusal, be compelled by mandamus to bring a suit under the intrusion act to test the right to an office. *State ex rel. Rills v. Lynch*, 23 An. 786; *Hayes v. Thompson*, 21 An. 656.

**A** PPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Posey, J. J. O. Stafford* and *R. W. Knickerbocker*, for relators. *G. G. Fisk*, District Attorney, respondent.

LUDELING, C. J. The only question necessary to be decided in this case is, whether or not the district attorney can be compelled by mandamus to bring an action under the intrusion act.

This is not now an open question. We held in *Hayes v. Thompson*, 21 An. 656. that the district attorney could be compelled by mandamus to bring the suit, and the same doctrine has been several times reaffirmed since. *State ex rel. Rills v. B. L. Lynch*, 23 An. 786.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed with costs of appeal.

## No. 3836.—WARREN &amp; CRAWFORD v. J. J. B. KIRK.

A sale of a certain number of bales of cotton to be delivered thirty days after demand, is at the risk of the seller until delivery. The defense that the cotton of the defendant was destroyed during the war will not avail, if by the terms of the contract no particular lot of cotton was indicated as being sold; but the seller in such case is required to fulfill his contract of sale by delivering the number of bales sold or by paying the price in money.

**A** PPEAL from the Seventh Judicial District Court, parish of Avoyelles. *Miller, J. A. B. Irion*, for plaintiffs and appellees. *Edward Phillips*, for defendant and appellant.

WILY, J. This suit was instituted upon the following obligation:

"Thirty days after demand, I promise to deliver in New Orleans, in good condition, to Messrs. Warren & Crawford, or order, one hundred bales of cotton, the same having been sold by W. & C. for my account, at eight and a half cents for middling, and on which I am to receive an advance of thirty dollars per bale, the balance to be paid when said cotton is delivered.

J. J. B. KIRK."

"New Orleans, December 12, 1861."

On the first of August, 1865, the plaintiffs addressed a letter to the defendant demanding the fulfillment of his obligation. The defendant refused to comply with the demand, and in the month of April, 1866, suit was instituted for the recovery of the cotton, or its value. The court gave judgment for plaintiffs for \$3000, and the defendant has appealed. In the answer to the appeal the plaintiffs pray that the judgment be increased to \$16,000. There are several defenses pleaded, but none of them is established by the evidence. The defendant has received the consideration agreed to be advanced to him under the contract. He attempted to show that the one hundred bales he agreed to deliver was of a particular lot which was destroyed during the war; but in this he failed.

"The sale is considered to be perfect between the parties, and the property is of right acquired to the purchaser with regard to the seller, as soon as there exists an agreement for the object and for the price thereof, although the object has not yet been delivered, nor the price paid." Revised Code, 2456. "But if the object contracted to be given be not a thing particularly specified, but is uncertain, indeterminate, or described only by quantity or number, it is at the risk of the creditor only from the time he is in legal default for not receiving the thing after it has been tendered. A contract to deliver a certain number of bushels of wheat to pay a certain sum of money, or to ship a certain number of hogsheads of sugar, without further identification, comes under this rule." R. C. C. 1915. There is an exception to the rule "when the object of the contract, although indeterminate in itself, makes part of a whole that is determinate and certain, and the

whole, of which it forms a part, is lost or destroyed by inevitable accident before delivery, the loss will fall on the creditor of the thing sold." \* \* \* Art. 1916.

"In the case provided by the last article, it must appear that the designation of the mass, from which the particular object of the contract is taken, was intended by the parties as restrictive; that is to say, that their intention was confined to that particular property, and no other of the same kind. *When such intent is not clearly expressed, it shall be presumed that no such restriction was intended; and that the thing is at the risk of the debtor, until delivery or default.*" Art. 1917.

"When the goods, produce, or other objects are not sold in a lump, but by weight, by tally or by measure, the sale is not perfect, inasmuch as the things so sold are at the risk of the seller until they be weighed, counted or measured; but the buyer may require either the delivery of them or damages, if there be any, in case of non-execution of the contract." R. C. C., art. 2458.

Here the defendant unconditionally bound himself to deliver to the plaintiffs in New Orleans, in good condition, one hundred bales of cotton, of middling quality, thirty days after demand. He has long since received the advance of thirty dollars per bale, stipulated in the contract, but has failed to deliver the cotton notwithstanding the demand of the plaintiffs. He now says his cotton was destroyed during the war; but it is not shown that the number of bales mentioned in the contract was restricted, or intended by the parties to be restricted, to any particular lot of cotton; and "when such intent is not clearly expressed, it shall be presumed that no such restriction was intended." Until delivery, the cotton was therefore at the risk of the seller; and however unfortunate he may have been with it, he must bear the consequences of his voluntary agreement. He got the consideration he stipulated for, and he must now perform his part of the contract. But in his brief the defendant contends that the plaintiffs have failed to disclose either in their pleadings or in the evidence any right of action or any interest in the suit.

In the evidence we find the letter of the plaintiffs to the defendant as follows: "We have the pleasure to advise sale of one hundred bales of your cotton, to be delivered in New Orleans thirty days after demand on a basis of eight and a half cents for middling, the buyer advancing thirty dollars per bale on receipt of within document signed by you; the buyer holding us responsible for the fulfillment of the contract; we will have to insure the cotton and charge to your account. Please sign the within and return by first mail, and on receipt of the advance we will advise you. Your friends,

WARREN & CRAWFORD."

It appears that the defendant agreed to the sale, signed the contract

and returned it to the plaintiffs, his factors. On the twenty-sixth December, 1861, after the contract had been signed and returned, the plaintiffs wrote to the defendant: "We have completed, as far as circumstances will admit, the sale of your cotton, and can, therefore, remit you the amount or pay your drafts to the extent of the advance."

How the defendant, making a contract in which he knows that the plaintiffs are responsible for its fulfillment, and in which he unconditionally binds himself to them, can then turn round and say they have no interest and can not enforce it, we are at a loss to understand. It was on the responsibility of the plaintiffs that the defendant got the money, and it was doubtless for that reason he contracted to deliver the cotton to them. They are the obligees of the contract and certainly have an interest to enforce it.

It is shown that the value of the cotton at the time the defendant was in default for delivery, was \$16,000. The defendant must, therefore, deliver the cotton or pay that amount.

It is therefore ordered that the judgment appealed from be set aside, and it is ordered that the defendant deliver to the plaintiff according to the terms of the contract one hundred bales of cotton averaging four hundred pounds per bale, of middling quality within sixty days from date hereof, and in default thereof that he be condemned to pay the plaintiffs sixteen thousand dollars, with legal interest from judicial demand, less the sum of four hundred dollars, the balance due the defendant on delivery of the cotton under the contract. It is further ordered that he pay costs of both courts.

Rehearing refused.

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NO. 3135.—EDWARD PHILLIPS v. CHAS D. STEWART.

In a suit for the value of attorney's fees for professional services rendered, if the amount allowed by the judge *a quo* seems reasonable and fair, the judgment will not be disturbed on appeal.

**A**PPEAL from the Seventh Judicial District Court, parish of Pointe Coupée. *Miller, J. John Yoist*, for plaintiff and appellee. *Thomas H. Hewes*, for defendant and appellant.

LUDELING, C. J. This is a suit by an attorney at law to recover the amount of an account composed principally of charges for professional services rendered for the defendant.

The evidence showed that the defendant employed the plaintiff, and the services were rendered. Indeed these facts are not disputed. We are of opinion that the amounts allowed by the judge *a quo* are reasonable and fair.

It is therefore ordered and adjudged that the judgment of the district court be affirmed with costs of appeal.

## No. 3813.—WM. A. VESTAL v. GEO. H. SALLIS.

A bond given in a sequestration suit for the amount fixed by the judge, signed by the plaintiff in the sequestration suit and two other persons, and filed by the clerk with the number of the suit in the district court, is a sufficient compliance with the law to render it incumbent on the defendant in sequestration to urge any objections he may have to its informalities in *limine litis*.

**A**PPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. R. A. Hunter*, for plaintiff. *M. Ryan*, for defendant.

HOWELL, J. This is an appeal from a judgment on a verdict of a jury in favor of plaintiff for the account sued on and sustaining a writ of sequestration. The defendant contends that no sequestration bond was furnished, because the one in the record does not mention the court, the date, the title of the suit, nor the names of the plaintiff and defendant. The bond is for the amount fixed by the judge, is signed by the plaintiff and two other persons, is filed by the clerk on a particular date in the district court with the number of this suit. This is a sufficient compliance with the law, to make it incumbent at least upon the defendant to object to it in *limine litis*, which he did not do but gave a bond of release, and defended and tried the suit without having made any objections, which appear of record. It is too late for him to object.

Upon the merits we see no reason to disturb the verdict and judgment.

Judgment affirmed.

## No. 3743.—S. MEYER et al. v. M. J. SMITH &amp; Co. et al.

In a suit by the wife against her husband for a separation of property, the allegation that "owing to the insolvency of her husband it becomes necessary for the preservation of her acquisitions, the maintenance of herself and family, that a dissolution of the community be decreed," is deemed sufficient to admit proof that she has the ability to make acquisitions.

In a suit by the wife for a separation of property from her husband, she is a competent witness in her own behalf.

**A**PPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. J. G. White*, for plaintiff and appellee. *R. A. Hunter*, for defendants and appellants.

HOWELL, J. The principal question in this case is whether plaintiff's judgment of separation of property is valid. The objection to it is that she did not specially allege in her suit against her husband that she possessed a separate industry by which she could make acquisitions and support herself and family, and hence there was no basis for the judgment. Her allegation was that, "owing to the insolvency of her husband, it becomes necessary for the preservation of her acquisitions, the education, maintenance and support of herself and family, that a

dissolution of the community, etc., be decreed." This sufficiently implies her ability to make acquisitions and support herself and family, to authorize the proof thereof. Such proof she has adduced in this suit, and we must presume it was before the judge who rendered the judgment of separation of property on the issue regularly joined between the parties in the suit for separation of property. The court *a qua* did not err in admitting this evidence, nor the testimony of the plaintiff, who is competent to testify in her own behalf in this controversy with the defendants. She was not testifying in favor of her husband, but in her own behalf against defendant.

The evidence in the record sustains plaintiff's right to purchase, and her ownership of the goods seized by the defendants, and also her right to recover counsel fees in this case, which we fix at two hundred dollars, and allow upon the answer to the appeal.

It is therefore ordered that so much of the judgment as rejects plaintiff's demand for damages be reversed, and that she recover of Marshall J. Smith & Co. the sum of two hundred dollars damages, and that in other respects the said judgment be affirmed with costs of appeal.

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No. 3760.—E. BOEDICKER v. JOHN EAST et als.

An injunction will not be dissolved on bond if the injury caused thereby would be irreparable. The injury would be irreparable if the damages resulting from its dissolution could not be passed upon in the final decree in the case, or if its dissolution would work a change in the possession of real estate.

**A**PPEAL from the Fifth Judicial District Court, parish of East Feliciana. *Posey, J. Kernan & Lyons*, and *Kilbourne & McVea*, for plaintiff and appellant. *K. A. Cross*, for defendants and appellees.

LUDELING, C. J. The plaintiff brought this action to have the boundary between his land and that of the defendants recognized and fixed; he alleged that the defendants were disregarding the ancient boundary, and he obtained an injunction to restrain defendants from disturbing his possession.

The defendants disregarded this injunction and took possession of about one hundred acres of the cleared lands of plaintiff, and commenced to cultivate it. The plaintiff obtained a second injunction to prevent defendants from passing the ancient boundary, and from occupying and cultivating the said one hundred acres.

The defendants then obtained an order to set aside the injunction upon giving bond, and upon executing their bond the injunction was dissolved.

At the first term of the court thereafter held, the plaintiff moved to have the order setting aside the injunction rescinded, on the grounds that the said injunction could not be set aside by giving bond, as the injury complained of was irreparable.



This motion was refused, and the plaintiff then appealed from the interlocutory decree allowing the defendants to set aside the injunction by giving bond.

The question is then, was or was not the injury complained of, and to prevent which the injunction was granted, irreparable?

"Where the consequences of the order are such as cannot be remedied by a final decree, and the party will be driven for protection of his rights to another suit for the same cause of action, the injury is irreparable." 14 An. 57, *White v. Casanave*, 7 R. 442, 12 An. 455. In *Marion v. Johnson* we said "when the acts complained of amount to a trespass, and the effect of dissolving the injunction would be a change of possession of immovable property," the injury is irreparable. 22 An. 512. Such, it would seem, would be the result of the dissolution of the injunction in this case.

It is therefore ordered and adjudged that the order appealed from be rescinded and annulled, and that the injunction be reinstated. It is further ordered that appellees pay costs of the appeal.

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No. 3864.—*ROSALIE DURAND v. J. & J. DUBUCLET*—On rule against J. P. ADER.

Under the act of 1869, minor's property held in common may be sold for the purpose of affecting a partition at private sale, if any of the heirs having an interest desire it to be made in that form, by complying with the formalities prescribed by the statute in such case. Articles 341 and 1336 of the revised Civil Code which provide that the sale of minor's property must be made at public auction, is not in conflict with nor irreconcilable with the act of 1869 on the same subject, and those articles of the Code do not, therefore, repeal by implication the act of 1869.

A private sale of minor's property made in pursuance of the forms and requirements of the act of 1869 is, therefore, valid and binding upon the minor.

**A** PPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. Charles Loque*, for plaintiff and appellant. *Ernest Morel*, for defendants in rule appellees.

LUDELING, C. J. The only question presented in this case is whether the law of 1869, reproduced in articles 1500, 2667 and 3719 R. S. Statutes, is repealed by the article 341 and 1339 of the Revised Civil Code. The act of 1869 is in the following words: "When heirs of a succession hold property in common, and it is the wish of any one of them, or of a minor represented by his tutor or tutrix, to effect a partition, on the advice of a family meeting duly convened according to law, to represent the minor or minors, said property may be sold at private sale for its appraised value, said appraisement to be made and the terms of said sale to be fixed by the family meeting, and said proceeding to be homologated by the judge of probate of the parish in which the said minor resides."

Article 1339 of the Civil Code is in the following words: "When

the property is indivisible by its nature, or when it cannot be conveniently divided, the judge shall order at the instance of any of the heirs, on proof of either of these facts, that it be sold at public auction, after the time of notice or advertisement prescribed by law, and in the manner hereinafter prescribed." And article 341 declares that "the sale of the property of the minor shall be authorized by the judge, and made at public auction, after having been duly advertised in the manner required," etc.

The law of 1869 is not in conflict with the articles above quoted. The different provisions of the law might well be incorporated in the same act.

Thus, for instance, "the sale of the property of minors shall be authorized by the judge and made at public auction, after having been duly advertised in the manner required for other judicial advertisements," unless it be the wish of any of the heirs interested therein to have the sale made at private sale to effect a partition, in which event it may be sold at private sale, on the advice of a family meeting duly convened according to law, to represent the minor or minors, at the appraisement and on the terms fixed by the family meeting, if the proceedings of the family meeting be homologated by the parish judge of the parish where the minor resides. The laws are not irreconcilable with each other, and therefore the former law is not repealed by implication. C. C. 23. Repeals by implication are not favored. 12 M. 697; 2 N. S. 33; 3 N. S. 190; 7 La. 166; 1 An. 54; 2 An. 919; 5 An. 121; 6 An. 605.

We are therefore of opinion that the title tendered the defendant in accordance with the act of 1869 is valid.

It is therefore ordered that the judgment of the lower court be annulled, and that there be judgment decreeing J. P. Ader to comply with the terms of the sale agreed upon with him, and condemning the appellant to pay costs of both courts.

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No. 3800.—*ELIZA C. JOHNSON v. WM. D. PHILLIPS.*

Payments which have been made on a debt, which at the time of payment are imputed by both parties to the interest due, can not afterward be recovered back nor imputed to the capital on the ground that the interest due was usurious. Prescription may be pleaded at any stage of the proceedings, even on the appeal, but it must be pleaded expressly and specially before final judgment.

**A**PPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Posey, J. Fuqua & Callihan*, for plaintiff and appellee. *Samuel P. Greves*, for defendant and appellant.

HOWELL, J. The order of seizure and sale herein was enjoined by the defendant on the ground that the note is paid and extinguished by

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 Eliza C. Johnson v. Phillips.
 

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payments of usurious interest, as shown by the various credits indorsed on the note. It was given on twenty-fifth April, 1854, for \$2750 due one year from date with eight per cent. interest after maturity. A few days after its maturity a credit of \$250 is indorsed on it "for interest on account up to twenty-fifth April, 1855," and annually thereafter up to twenty-fifth April, 1861; the same amount is credited "for interest," as stated by defendant. The note not bearing interest before maturity, the first payment is imputed by plaintiff to the principal, and the demand is made for the balance (\$2500) with eight per cent. interest thereon from twenty-fifth April, 1861, to which date it is alleged the interest was paid, and subject to those subsequent credits paid as interest. These three credits are not alleged to be usurious, but it is contended that all the previous payments were, being ten per cent. annually upon the money loaned, and therefore worked the forfeiture of all interest and should be imputed to the capital, leaving due only \$1000, which has been more than paid subsequently.

The usurious payments having been expressly imputed by the parties to the interest, can not now be recovered back nor imputed to the capital, the plea of prescription having been filed. See 6 An. 471; 15 An. 395; 18 An. 715. Prescription may be pleaded in every stage of a cause, even on the appeal, but it ought to be pleaded expressly and specially before the final judgment. R. C. C. 3464.

Judgment affirmed.

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No. 3806.—S. WHITTINGTON v. W. W. WHITTINGTON, her Husband.—  
FRELSEN & STEVENSON, Interveners.

In considering the rulings of the judge *a quo* on the objections made to the admissibility of testimony, the appellate court will be guided by the bills of exceptions taken to his rulings on the admissibility of a certified copy of the recorder of an abstract, showing the wife's claim against her husband, on the ground that the oath attached to the instrument was made before a notary public who was incompetent to administer an oath in such a case; and if the certificate shows also that the notary was a justice of the peace, then the presumption is that the officer administered the oath in his proper capacity and the document is not inadmissible on that account.

**A** PPEAL from the Ninth Judicial District Court, parish of Rapides.  
*A. Orsborn, J. S. G. White*, for plaintiff and appellee. *M. Ryan*, for defendant and appellant.

**HOWELL, J.** The intervenors have appealed from a judgment recognizing plaintiff's mortgage upon her husband's property, dating from 1854 and 1855.

They reserved a bill of exceptions to the admissibility in evidence of the parish recorder's certified copy of the statement of plaintiff's claim against her husband, required by the act of 1869, on the grounds, *first*, that it was sworn to before a notary public, who is incompetent

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S. Whittington v. W. W. Whittington, her Husband.

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to administer an oath in such a case. Admitting that the notary is incompetent, we find in the bill of exception the fact stated, that the said notary was also a justice of the peace, a fact which is not denied and which under the circumstances we must presume was properly established. We must be guided by the bill of exceptions as to the objections made and the grounds of the ruling. The oath was therefore administered by a competent officer. The *second* ground is, the "statement" does not appear to have been recorded in the mortgage book as the law directs. The certificate of the recorder on the date of recording is, that it is "a true record," and subsequently that the copy offered is "a true and correct copy of the original on file and of record in my (the recorder's) office." We must presume from this that the recorder did his duty and made the recordation in the book designated by the law. The objection in the brief that the "statement" is so vague as not to show that the moneys received by the husband were the moneys of his wife derived from her mother's estate, is not well founded. It is sufficiently clear, from the language used, that the sums acknowledged to have been received by the husband at the dates specified, were moneys inherited by his wife from her mother, for the security of which the law accorded the wife a mortgage upon the mortgageable property of the husband.

Judgment affirmed.

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No. 3730.—PAUL LEVYSON & CO. v. M. C. WARD et al.

In an action to set aside a sale of a lot of cattle, on the ground that it was fraudulent, the vendor being in insolvent circumstances at the time, evidence to show the insolvency of the vendor is inadmissible against the purchaser unless it be alleged that the purchaser was aware of the insolvency at the time of the sale.

**A**PPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. J. G. White*, for plaintiffs and appellants. *H. S. Losce*, for defendant and appellee.

HOWE, J. The plaintiffs sue the defendant, Ward, on his promissory note; they also sue to set aside the sale of one hundred and seventy-five head of cattle, three horses and one wagon, made by Ward to the defendant, Cullen, on the ground that said sale was a constructive fraud, Ward being in insolvent circumstances, and the sale being for the purpose of giving Cullen a preference over other creditors. The court gave judgment against Ward for the sum claimed by the plaintiffs, but refused to set aside the sale. The plaintiffs appeal.

It was not alleged that the purchaser, Cullen, knew that his vendor, Ward, was in insolvent circumstances, or had not sufficient property to pay his debts, when he bought the property from him. The counsel for Cullen, therefore, properly objected to the evidence to show the

Levyson &amp; Co. v. Ward et al.

fact, and his bill of exceptions was well taken to its admission by the court. It is shown that Ward brought the drove of cattle, with the horses and wagon, from Texas to Alexandria for sale, and that the contract he made with Cullen was in the usual course of his business. It seems to us, therefore, that this sale is protected by art. 1986 Revised Code, regardless of Ward's embarrassed circumstances. 16 An. 402; 4 R. 438; 21 An. 667.

Let the judgment appealed from be affirmed with costs.

No. 3714.—B. THORNHILL et al. v. PICARD & WEIL.

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A commission merchant who has made advances to a planter, under an agreement that the latter is to ship his entire crop to the merchant, and the planter ships a portion of his cotton to another merchant, then and in that case the merchant who made the advances may recover from the planter the usual commissions which he would be entitled to charge on the part of the crop shipped to other parties.

**A** PPEAL from the Seventh Judicial District Court, parish of West Feliciana. *Miller, J. Farrar & Montgomery*, for plaintiffs and appellants. *Collins & Leake*, for defendants and appellees.

**WYLY, J.** The plaintiffs, as the legal representatives of the late commercial firm of Thornhill & Nixon, sue the defendants for the balance of an account and also for commissions on two hundred and ninety-two bales of cotton which it is alleged they agreed to ship to said firm but afterward failed to do so. The defendants admitted the balance of account and alleged legal tender thereof, but denied any agreement to pay commissions on cotton not shipped.

The court gave judgment for plaintiffs for the amount of the balance of the account, but rejected their claim for the commissions. The plaintiffs appeal.

On the fifth day of July, 1869, the defendants wrote to Thornhill & Nixon: "Are you willing to let us draw on you, when needed, the the amount of \$3000 without charging us the two and a half per cent. for advancing. If so, we shall ship our cotton to you, as promised by our Mr. Weil to your Mr. Nixon. We are furnishing to the amount of three hundred and fifty bales at least, besides the cotton we may buy during the season." \* \* \* \* \*

This proposition was accepted by Thornhill & Nixon, as appears by the evidence, especially the defendants' letter to them dated eleventh July, 1869, to wit: Your dispatch and favor, eighth instant are both received, wherein we are informed that you accept our proposition. In addition to our business, we shall use our influence toward getting other parties to ship you some cotton." \* \* \* \* \*

It appears that the defendants failed to perform their part of the agreement; that they only shipped to Thornhill & Nixon fifty-eight

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bales; that they shipped one hundred bales to Lehman, Newgass & Co.; and no cause is shown for failing to perform their engagement.

In order to obtain the advance of \$3000 on the terms stated, the defendants expressly agreed to ship Thornhill & Nixon all their cotton; this implied, of course, the agreement that they should have the usual commission of two and a half per cent. for selling the same; otherwise there would be no motive for the said firm to make the advance. We therefore think the plaintiffs should recover the commissions claimed on the one hundred bales shipped to Lehman, Newgass & Co., which amounts to \$242 50, estimating the value of the cotton at \$97 per bale, the average price of fifty-eight bales delivered under the contract. 2 An. 624; 5 An. 505, 548.

It is therefore ordered that the judgment appealed from be increased by adding to the amount thereof the further sum of two hundred and forty-two dollars and fifty cents, and that the defendants pay costs of both courts.

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No. 3787.—MARY AND MATILDA BYNUM v. SMITH GORDON, Executor of  
of G. M. LONG—CONSOLIDATED ASSOCIATION OF PLANTERS OF  
LOUISIANA, Intervenor.

A judgment which is not signed by the judge *a quo* can not be made the basis of a plea of prescription. The rendering of judgment for the amount due and on terms to meet the other installments not yet due, does not merge the unmatured installments in the judgment, and, therefore, such a judgment can not be made the basis of prescription, to commence from its date.

**A** PPEAL from the Ninth Judicial District Court, parish of Rapides.  
*Orsborn J. W. A. Seay, R. J. Bowman and M. Ryan*, for plaintiffs. *A. N. Ogden*, for defendant. *T. C. Manning*, for intervenors and appellants.

HOWELL, J. In this proceeding the district court rendered a judgment in favor of the intervenors for the sums claimed, with a first mortgage on twelve hundred and seventy-three arpents of land, and in favor of the plaintiffs for a part of their claim, with second mortgage on the above land and a first mortgage on two smaller tracts. From the judgment in favor of the intervenors the plaintiffs have appealed. The ground of their complaint is, that the district court refused to sustain their plea of prescription against the judgment of intervenors rendered in 1851.

A certified copy of this judgment is in the record, unsigned, and can not therefore well be taken as a basis for the prescription interposed; but considering it a final judgment, it can not be a barrier to the intervenors' demand in this action because not revived; for it only definitely on so much of their claim as was then due, and did the sale of the mortgaged property to pay the amount decreed

Mary and Matilda Bynum v. Gordon.

to be due, and on terms to meet subsequent installments as they became due. And it is shown and admitted that the installments then due, in May, 1851, and all the installments down to 1858 inclusive, and a part of the one due in 1859, have been paid. The demand in this proceeding is for the installments due from the last date to 1865 inclusive, being the balance of an original stock loan made in 1842 by the intervenors to the plaintiffs' mother, long prior to the origin of their claim. Each installment thereof and of the contribution obligations, originating in 1848, claimed also herein, became exigible as it fell due and not before, and the recognition, in the judgment of 1851, of these series of installments falling due in the future, did not and could not merge them in the said judgment, and the question of its prescription does not arise. As well might it be said that a judgment on one of a series of mortgage notes held by one party, with an order to sell the property for cash to pay it, and on terms to meet the others in the hands of other and unknown parties, would merge the latter in the judgment by prescription or otherwise, and preclude the holders thereof from suing on them when they become due. According to plaintiffs' theory a part of the intervenors' claims would be prescribed before it becomes due. Such an application of the law of prescription is not admissible.

But admit that the judgment of May, 1851, condemning the defendant therein to pay the sum decreed to be due, and ordering the property to be sold, is prescribed, it does not affect the intervenors' right to enforce the payment of the sums which have fallen due since 1858. The allegations of their petitions here do not make that judgment the basis of their action.

We find no error in the judgment to the prejudice of the plaintiffs in this respect. It is unnecessary to examine the other questions presented in argument.

Judgment affirmed.

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No. 3731.—STATE OF LOUISIANA v. CHARLES SCOTT.

A witness in a criminal trial, who has first been examined in chief, consigned and cross-examined, may be again recalled and re-examined, by the party who first introduced him, upon points touching which he had not before testified.

**A**PPPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. S. Belden*, Attorney General, for the State. *J. G. White*, for the accused.

**Howe, J.** It appears, by a bill of exceptions, that upon the trial of the prisoner the State produced and examined a witness whom the defendant then cross-examined. The case for the State having been closed, the defendant desired to call the same witness for the defense,

but the State objected and the judge *a quo* sustained the objection. We think the judge erred.

In the case of *Duncan*, 8 Rob. 563, it was said: "It is understood to be now the universal practice of the courts of this State in both civil and criminal proceedings to permit a witness, after having been examined in chief, consigned and cross-examined, to be again examined by the party introducing him upon points touching which he had not before testified; and subsequently to be recalled and interrogated in relation to facts material to the issue which had not been previously elicited either from inadvertence or ignorance that they were within the knowledge of the witness."

The statement by the judge *a quo* in the bill of exceptions that the witness had already been "cross-examined by the attorney for the prisoner until the patience of the court was exhausted," and that "the court said to the witness 'have you told all you know about this case?' and the witness said 'yes,'" can hardly suffice to take the cause out of the operation of this just rule. The time of a court can never be better employed than in hearing testimony for the defense in a criminal case; and the statement of the witness that she knew nothing more about the case could certainly be of no weight. Many facts which she may have deemed irrelevant might have proved to be very important.

It is therefore ordered that the judgment appealed from be reversed, the verdict set aside and the cause remanded for a new trial.

#### NO. 3710.—SUCCESSION OF THOMAS J. WELLS.

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An executor or administrator is bound by his oath of office, to defend the rights of the succession he administers, and when suits are brought in the courts where the succession is administered, he may employ counsel to aid him, who must be paid by the succession.

An attorney's fees for services rendered the succession is a debt against the estate, which must be paid by preference over the creditors of the deceased.

In estimating the value of services rendered by attorneys to an estate while under administration, the court will not be governed entirely by the evidence given on the trial of the oppositions thereto, but it will fix such an amount as appears from the nature of the services rendered reasonable and just.

**A**PPEAL from the Parish Court, parish of Rapides. *H. L. Daigre*, Parish Judge. *M. Ryan*, *T. C. Manning* and *James G. White*, for executor and attorneys, appellants. *E. North Cullom* and *Wm. Seay*, for opponent and appellee.

**LUDELING, C. J.** This is an appeal from a judgment of the parish court of the parish of Rapides, on opposition to a tableau of distribution, filed by the executor of *Thomas J. Wells*.

The items opposed are the executor's commissions and the attorneys' fees.

The amount of the commissions charged by the executor is such as the law allows; and, as a debt due by the succession, it is entitled to be paid by preference over the debts of the deceased.



In regard to the fees of M. Ryan and Manning and White, the evidence proves that the said attorneys were employed by the executor to attend to the mortuary proceedings of the succession, and to protect the rights of the succession in various litigated and important suits. Although the evidence in the record would justify us in allowing the full amount charged by them, yet, under the settled jurisprudence of this State, we do not feel constrained to adhere to the estimates of witnesses as to the amounts which should be allowed as fees; and we will fix the fees as appears to us, from the nature of the services, reasonable and just.

The fees of E. C. Billings and Labatt and Preston, placed upon the tableau, were opposed, and no evidence was offered to show that they were due.

The opponents contend that the fees of the attorneys and commissions of the executor are not privileged claims, and that the attorneys' fees are not debts chargeable to the succession, inasmuch as their services did not inure to the benefit of all the parties in interest, and that their services did not inure to the benefit of opponent, in particular, with whom most of the litigation was carried on.

It is the duty of executors and administrators to assert and defend the rights of the successions they administer; and to do so in the courts, they must employ the services of lawyers, for which the successions should pay. All interested in the successions may be said to be benefited by such legal services, inasmuch as there could be no settlement of a succession until all contests relative to debts claimed against the successions, or to the rights of the successions to property, had been determined. Other creditors than the opponent were interested in the succession; and as the succession will not be able to pay all the debts against it, it would have benefited them to defeat the opponent's claim. There is nothing in the record to show that the executor abused the right vested in him to employ counsel to defend the rights of the succession.

The fees of attorneys for services of this nature and commissions of administrators and executors are debts of the succession, and they are of a higher dignity than the debts of the deceased and they must be paid by preference. 10 La. 440; 3 An. 396; 18 An. 721.

It is therefore ordered and adjudged that the judgment of the lower court be amended as follows: by allowing five hundred dollars to M. Ryan and two thousand dollars to Manning and White, with preference over the debts of the deceased, other than privileged claims, and by maintaining the opposition to the claims of E. C. Billings and Labatt and Preston. It is further ordered, that as thus amended, the judgment of the lower court be affirmed and that appellee pay costs of this appeal.

No. 3669.—M. EGANA, J. N. LEA and E. DUPASSEUR—MRS. A. BRINGIER, subrogated, v. M. S. BRINGIER—MR. AND MRS. TUREAUD, Garnishees. (Consolidated cases).

The seizure of goods or effects in the hands of the garnishee is deemed to be made by the sheriff at the date of the service of the interrogatories upon him. The return by the sheriff of the *feri facias* without returning a copy thereof, before the garnishee has answered the interrogatories, is not therefore an abandonment of the seizure made by the plaintiff in execution. In such a case the garnishee must answer the interrogatories the same as if the writ of *feri facias* or a copy thereof was still in the hands of the sheriff.

**A**PPEAL from the Fourth Judicial District Court, parish of Ascension. *Beauvais, J. A. Trudeau and Legendre & Roche*, for appellees. *Trist & Oliver*, for garnishees, appellants.

HOWELL, J. The only question in this case is whether or not the return by the sheriff of the *feri facias* without retaining a copy thereof, after service of garnishment process on garnishees, but before they had answered, is an abandonment of the seizure by the plaintiff in execution, so as to relieve the garnishees from answering. The question must be answered in the negative. Article 246 C. P. directs that upon issuing a *feri facias* a third person may be cited to answer interrogatories touching his indebtedness to or having in his possession any property of the defendant, and he is bound to answer in the same manner and be held liable in the same manner for his neglect or refusal to answer, and his answers may be disproved in the same manner as those of garnishees; and the seizure shall be deemed to be as by the sheriff from the date of the service of the interrogatories on such person.

It is necessary for the writ of *feri facias* to be in the sheriff's hands at the time of the service of the petition and interrogatories, but we are not aware of any provision of the law which makes the duty and liability of the garnishee in such a case or the force of the seizure depend on the retention of the writ of *feri facias* by the sheriff. Even in the case of seizure of property in the ordinary execution of a judgment, the return of the writ without retaining a copy does not release the seizure or impair the privilege, unless the plaintiff or the court order the return. See R. S. § 3416.

The seizure by garnishment proceedings can not be put in any harder condition, even if it be conceded that this provision of the law does not apply to the latter mode of proceeding. The judge *a quo* did not err in overruling the exception of the garnishees to answer, and ordering them to pay.

We do not think this a case for damages for delay; and besides appellee has asked an amendment of the judgment in her favor, and she can not at the same time be heard to ask for damages.

Judgment affirmed.

Rehearing refused.

## No. 2474.—BUSSEY &amp; CO. v. MISSISSIPPI VALLEY TRANSPORTATION COMPANY.

A towboat used in towing barges or other water craft, which are loaded with freight, from one point to another on the river, is a common carrier, and the persons owning such towboat, who undertake to tow a barge, loaded with freight or merchandise from one given point to another on the Mississippi river, first giving a bill of lading for the transportation of the cargo on board of the barge, are liable for the delivery of the cargo at the port of destination the same as if it had been placed on board the towboat herself.

The value of goods shipped on board of a barge at St. Louis, to be towed to New Orleans by a towboat, may therefore be recovered from the company owning the towboat in case of loss while on the trip, resulting from the negligence, carelessness or want of skill in the persons managing the towboat.

**A** PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Gibson & Austin*, for plaintiffs and appellees. *R. & H. Marr*, for defendants and appellants.

HOWE, J. The plaintiffs, a commercial firm, sued the defendants, a corporation, whose business is to transport merchandise in their own model barges, and to tow the barges of other parties for hire between St. Louis and New Orleans.

The bill of lading, given by defendants to plaintiffs, recites the receipt from plaintiffs of one barge loaded with hay and corn, "in apparent good order in tow of the good steamboat Bee and barges," "to be delivered without delay in like good order (the dangers of navigation, fire, explosion and collision excepted) to Bussey & Co. at New Orleans, Louisiana, on levee or wharf boat, he or they paying freight at the rate annexed, or \$700 for barge, and charges \$267 50." \* \* \* "It is agreed with shippers," the bill continues, "that the Bee and barges are not accountable for sinking or damage to barge, except from gross carelessness."

It was alleged by plaintiffs that defendants had neglected to deliver the barge and her valuable cargo according to their contract. The defendants answered by a general denial, and by a recital of what they claimed to be the circumstances of the loss of the barge and cargo, in which they contended they were without blame; and that the loss did not result from gross carelessness on their part, and they were not liable under the bill of lading. Other defenses were raised by the answer which have been abandoned.

The court *a qua* gave judgment for plaintiffs for the amount claimed as the value of the barge and cargo, \$15,272 60, with interest from judicial demand, and defendants appealed.

The appellants contend, as stated in their printed argument,

"First—That they are not common carriers, or rather that their undertaking in this, or like cases, is not that of a common carrier.

"Second—That they are liable, if liable at all, only in case of gross carelessness.

*Bussey & Co. v. Mississippi Valley Transportation Company.*

"*Third*—That the restriction of liability contained in the agreement to tow the barge in question exonerates them, except in case of gross carelessness—as the appellants were bound to use but ordinary prudence, even if they were common carriers.

"*Fourth*—That the judgment rendered is for a larger amount than the testimony will authorize."

The question whether a towboat under the circumstances of this particular case is a common carrier has been long settled in the affirmative in Louisiana; and the reasoning by which Judge Matthews supported this conclusion in the leading case of *Smith v. Pierce*, 1 La. 354, is worthy of the sagacity for which that jurist was pre-eminent. The same opinion was clearly intimated by the Supreme Court of Massachusetts in the case of *Sproul v. Hemmingway*, 14 Pickering, p. 1, in which Chief Justice Shaw was the organ of the court.

In the case also of *Alexander v. Green*, 7 Hill p. 533, the Court of Errors of New York seem to have been of the same opinion. Four of the senators in giving their reasons distinctly state their belief that the towboat in that case was a common carrier, and Judge Matthews' decision is referred to in terms of commendation as a precedent. It is true that Mr. Justice Bronson, whose opinion was thus reversed, in a subsequent case declares (2 Comstock, 208) that nobody could tell what the Court of Errors did decide in *Alexander v. Greene*, but the facts remain as above stated, and the effect of the case can not but be to fortify the authority of the decision in 1 La.

In addition to these authorities we have the weighty opinion of Mr. Kent who includes "steam towboats" in his list of common carriers, 2 Kent 599, and of Judge Kane in 13 Law Reporter 399. On the other hand, Judge Story seems to be of a different opinion (Bailments § 496), and Mr. Justice Grier differed from Judge Kane.

So, too, the Supreme Court of New York, in *Caton v. Rumney* 13 Wendell 387, and *Alexander v. Greene*, 3 Hill 9; the Court of Appeals of the same State in *Well v. Steam Nav. Co.*, 2 Comstock 207; the Supreme Court of Pennsylvania in *Leonard v. Hendrickson*, 18 State, 40, and *Brown v. Clegg*, 63 State 51; and the Supreme Court of Maryland in *Penn. Co. v. Sandridge*, 8 Gill & Johnson 248, decided that tugboats in these particular cases were not common carriers. We are informed that the same decision was made in the case of the *Neafie*, lately decided in the United States Circuit Court in New Orleans.

Such conflict of authority might be very distressing to the student, but for the fact that when these writers and cases cited by them are examined the discrepancy, except in the decision in 63 Penn., is more imaginary than real. There are two very different ways in which a steam towboat may be employed, and it is likely that Mr. Story was

contemplating one method and Mr. Kent the other. In the first place it may be employed as a mere means of locomotion under the entire control of the towed vessel; or the owner of the towed vessel and goods therein may remain in possession and control of the property thus transported to the exclusion of the bailee; or the towing may be casual merely, and not as a regular business between fixed *termini*. Such were the facts in some form as stated or assumed in *Caton v Rumney*, 13 Wend. and *Alexandria v. Greene*, 3 Hill, cited by Judge Story in the case of the *Neafie*, and in the cases above quoted from 2 Comstock, 18 Penn. State, and 8 Gill & Johnson; and it might well be said that under such circumstances the towboat or tug is not a common carrier. But a second and quite different method of employing a towboat is where she plies regularly between fixed *termini*, towing for hire and for all persons, barges laden with goods, and taking into her full possession and control, and out of the control of the bailor the property thus transported. Such is the case at bar. It seems to satisfy every requirement in the definition of a common carrier. Story on Bail § 495. And it was probably to a towboat employed in this way that Mr. Kent referred in the passage quoted above; and that the Supreme Court of Massachusetts had in mind in the *14 Pickering*; and see also *Davis v. Housen*, 6 Rob. 259, and *Clapp v. Stanton* 20 An. 495. We must think that in all reason the liability of the defendants under such circumstances should be precisely the same as if, the barge being much smaller, it had been carried, cargo and all, on the deck of their tug.

But conceding that this case as a contract of affreightment must be determined by the law of Missouri (4 Martin 584), and that by that law the defendants are not common carriers as to the plaintiffs, we think it clear from the evidence of the defendants' own witnesses that they were guilty of "gross carelessness" in their attempt to deliver the plaintiffs' barge with its cargo at the port of New Orleans, and that by this gross carelessness she was sunk, and, with her cargo, destroyed.

What is "gross carelessness?" In an employment requiring skill, it is the failure to exercise skill. *New World v. King*, 16 Howard 475. The employment of the defendants certainly required skill. A lack of that dexterity which comes from long experience only, might be swiftly fatal, for but a single plank intervenes between the costly cargo and instant destruction. We have but to read the testimony of defendants' own witnesses, and especially Conley, Turner, Burdeau, and Sylvester, to see that the attempt to land the barge was made without skill, and that it might easily have been effected with entire safety.

We are of opinion that the judgment was correctly rendered in favor

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 Bussey & Co. v. Mississippi Valley Transportation Company.
 

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of plaintiffs, but that the amount is somewhat excessive. We find the value of the property lost at this port, less the freight and charges, and a small amount realized from the wreck to be \$13,268 50.

It is therefore ordered that the judgment appealed from be amended by reducing the amount thereof to the sum of thirteen thousand two hundred and sixty-eight dollars and fifty cents with legal interest from judicial demand and costs of the lower court, and that as thus amended it be affirmed, appellees to pay costs of appeal.

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 No. 3778.—E. J. COCKFIELD v. B. & B. TOURRES.
 

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The fact that a party cast in a suit has brought an action of nullity of judgment will not interfere with his right of appeal from the same judgment. The appeal will not therefore be dismissed on that ground.

A garnishee who is required to answer interrogatories in open court on a day fixed, is entitled to personal notice, which must be given him a reasonable time before the day for answering. A judgment rendered against a garnishee on interrogatories taken *pro confesso* without notice having been given for a reasonable time to the garnishee, will be set aside on appeal, and the cause will be remanded.

**A**PPEAL from the Ninth Judicial District Court, parish of Natchitoches. *Orsborn J. Jack & Pierson* and *Morse & Dranguet*, for appellants. *J. M. B. Tucker*, for appellee.

**TALIAFERRO, J.** The plaintiff obtained judgment against the defendants for \$2500 with interest, and against the garnishees, Llorens & Curry, *in solido*, for \$1171 with interest. From this judgment the garnishees alone appeal.

The plaintiff and appellee moves to dismiss the appeal on the ground that the garnishees have brought in the proper court an action to annul the judgment appealed from, and that the action to annul is still pending. We know of no law which precludes a party from appealing from a judgment rendered against him because he has resorted to another means of defense against that judgment. The motion to dismiss is overruled.

On the merits, the only matter in controversy necessary to consider, at the present stage of the proceedings, is the question as to the sufficiency of the notice to the garnishees of the order to answer the interrogatories. The garnishees were duly brought into court by citation on the ninth of June, 1871. An order was rendered for them to answer the interrogatories on the fifteenth of that month, and notices issued which the sheriff returned; he was unable to serve from the obstruction of high water which prevented him from reaching the domicile of the parties. The time was extended for answering, and the sheriff again failed from the same cause to serve the notices. Finally, on the sixth of November the time was extended to the fifteenth of that month; and the sheriff returned that he had served a copy of the

order on A. J. Curry, one of the members of the firm of Llorens & Curry, the two garnishees, on the fourteenth of November, the service being made at his store twenty-five miles from the court house.

It has been held that whenever an act is to be done by a party personally which can not be done by his counsel, he is entitled to a special notice of the order and of the particular day on which he is required to comply with it, before he can be deemed to be in default. 2 An. 11.

The garnishees in this case were required to answer in open court on the fifteenth of November, and the notice was not served until the fourteenth, the distance between their domicile and the courthouse being twenty-five miles. This can not, we think, be held a compliance with law. Whenever notice to a party is required and the law fixes no specific time to intervene between service of the notice and the time when the required act is to be performed, a reasonable time is implied. We think in this instance the garnishees were not allowed a reasonable time for answering, and therefore the judgment taken against them *pro confesso* was premature.

It is therefore ordered, adjudged and decreed that the judgment of the lower court, so far as it affects Llorens & Curry, cited as garnishees, be annulled, avoided and reversed, reserving to the plaintiff the right to have legal notice of the order to answer served upon the garnishees.

It is further ordered that this case be remanded to the lower court to be further proceeded with according to law.

#### NO. 3823.—MARTIN, COBB & CO. v. TEMPLE S. COONS.

The act of Congress of March 2, 1867, which authorizes the removal of a cause from a State court to the Circuit Court of the United States under certain circumstances does not change the law regulating the jurisdiction of the Federal Court, as to persons. A removal of a cause to the Circuit Court of the United States cannot therefore be allowed if the record fails to show that as to persons, the Federal Court can exercise no jurisdiction. An application for a removal based on the allegations of an intervenor alone, that he is not a resident of the State, is not sufficient to authorize the change, if the record shows that the plaintiffs in the action are residents of the State. Moreover the application will not be granted, if the intervenor merely avers that he is, at the time of the filing of his intervention, a resident of another State. It results then that in such a case the intervenor must allege and show affirmatively that he and the plaintiffs were both residents of another State than that of the defendant at the time suit was brought.

**A**PPEAL from the Thirteenth Judicial District Court, parish of Madison. *Hough, J. Sparrow & Montgomery*, for plaintiffs. *J. C. Peale*, for defendant. *Farrar & Reeves*, for intervenor.

HOWE, J. The plaintiffs T. J. Martin, Daniel Cobb, John D. Cobb, and John Dolhonde, alleging that they composed "the commercial firm of Martin, Cobb & Co., domiciliated and doing business in the city of New Orleans," brought suit against the defendant Coons, a

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Martin, Cobb & Co. v. Coons.

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resident of Madison parish, Louisiana, to recover the sum of \$21,770 49 on a promissory note.

Various defenses were made, including a demand in reconvention against plaintiffs for the sum of \$7821 02, and a further demand for the sum of \$36,000.

The cause was tried by a jury, who rendered a verdict in favor of defendant as to the claim of the plaintiffs, but rejecting the reconventional demands. The judge *a quo* thereupon granted a new trial.

Up to this stage of the case it is plain that the controversy was one which belonged to a State court, and of which the Federal tribunals in Louisiana could have no jurisdiction, either by reason of person or subject matter. But T. J. Martin, one of the plaintiffs, desiring to remove the cause to the United States Circuit Court, presented an affidavit in the court *a qua*, the portions of which necessary to be noticed, are as follows:

"That your petitioner is the sole owner of the claims or debts upon which this suit is founded; that said firm (of plaintiffs) has been dissolved, and the said demands have been handed over by said firm to your petitioner, who has the exclusive control thereof and the sole right to collect the same.

"That your petitioner resided out of the State of Louisiana, to wit, in the State of Kentucky, and he avers that he has reason to and does believe that from prejudice and local influence in this parish he will not be able to obtain justice in this court, and that he is desirous of removing this suit to the Circuit Court of the United States." \* \*

Upon these and the other and formal allegations of the affidavit, the judge *a quo* made an order of removal, from which the defendants have appealed.

The proceedings by mandamus to compel this appeal are reported in State ex rel. Coons v. The Judge, etc., 23 An. 29.

We think the judge *a quo* erred in granting the order of removal. In the first place the statute of March 2, 1867, does not make any change in the jurisdiction of the Federal court as to persons. It is still required that the plaintiff should be a citizen of one State and the defendant of another. And it is well settled that this means that all the plaintiffs should be citizens of a State different from that of the defendant. Brightley's Fed. Dig., 125, 126, 127; Smith v. Rives, 2 Sumner, 338; Wilson v. Blodget, 4 McLean 363; Hubbard v. Northern Railroad Co., 25 Vermont, 715.

It is not pretended that all the plaintiffs in this case are citizens of some State other than Louisiana, and it would seem therefore that the plaintiff, Martin, alone, has no right to remove the cause to the United States Circuit Court, even if he himself were properly alleged to be a citizen of Kentucky. Hubbard v. Northern Railroad Co., 3 Blatch-



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ford's C. C., 84; Beardsley v. Torrey, 4 Wash. C. C. 286; *in re* Turner, 3 Wallace Jr., C. C. —.

But Martin does not allege himself to be a citizen of any State other than Louisiana. He says he "resided" in Kentucky. Passing over the manifest fact that this allegation is entirely consistent with his having been a citizen of Louisiana when this suit was begun, and ever since—for it may merely mean that he resided in Kentucky in the year 1840—it is inadequate, under the most favorable construction, to remove the cause. An application for removal must show that the petitioner therefor is a citizen of another State; an averment that he is a resident is not sufficient. *Parker v. Overman*, 18 Howard 137.

Moreover, it does not even appear by the record or affidavit that the defendant Coons is a citizen of Louisiana. For any thing that appears to the contrary, he may be a citizen of Kentucky.

It might also be a matter of interest to inquire if it were necessary, what is to become of the large reconventional demand of defendant against all the plaintiffs? Is Coons to be deprived of the right to urge this demand against the Cobbs and Dolhonde, because Martin "resided" in Kentucky and distrusts the sense of justice of the people of Madison parish?

For these reasons, let the order appealed from be reversed and annulled at the costs of appellee.

#### No. 3755.—MRS. E. R. JEMISON v. MRS. ELEANOR E. BARROW.

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Where a married woman appears in court as plaintiff without the authorization of her husband, the presumption is that the husband has refused, and the judge may authorize her without it being shown that the husband was absent or refused.

A third person who discloses no interest in a suit to annul a sale, on the ground that the vendor has not complied with its terms and conditions, can not be permitted to intervene in the suit.

**A**PPEAL from the Seventh Judicial District Court, parish of West Feliciana. *Miller, J. Wickliffe & Fisher*, for plaintiff and appellee. *Collins & Leake*, for defendant and appellant.

**TALIAFERRO, J.** The plaintiff sues to annul a contract of sale to her of a tract of land by the defendant alleging that the conditions upon which the purchase was made have not been complied with on the part of the seller. The answer excepts that plaintiff has no cause of action, and if the exception is overruled the defendant pleads the general issue.

An application was made on the part of J. F. Irvine to intervene in the suit. This was objected to on the part of the plaintiff's counsel for the reason that the intervention came too late, the trial of the case having already begun. That Irvine had no interest in the cause; that

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Mrs. E. R. Jemison v. Mrs. Eleanor E. Barrow.

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he could not stand in judgment in any matter involved in the controversy; that he was in no manner a party or privy to the original contract in relation to which this suit has arisen. The objections were sustained and the intervention refused. To this ruling the applicant took a bill of exceptions.

There was judgment in favor of the plaintiff annulling the sale, and reinstating her mortgage rights upon the land described in the act annulled as they existed prior to the sale. From this judgment the defendant has appealed. Irvine has also appealed.

The defendant excepts to the right of plaintiff to prosecute this suit, for the reason that on the day of filing the same she obtained the authorization of the judge to bring the action without showing the absence or refusal of her husband to grant the authority.

We think this objection is without weight. The judge may authorize the wife to appear in court if the husband fail or refuse to do it; the wife, who is plaintiff, being authorized in this case by the judge, the presumption is that the husband failed or refused to authorize her.

The facts of this case are, that at the time of the sale from Mrs. Barrow to Mrs. Jemison, the latter had a judicial mortgage affecting the property of the former to the extent of \$10,000. By the terms of the agreement the land conveyed was taken at the valuation of \$6000, for which a credit was to be entered on the judgment. At the time this contract was entered into, there were two other creditors of Mrs. Barrow, Newgass and Mrs. Richardson having judicial mortgages bearing on her property concurrent with Mrs. Jemison's mortgage. It seems the six hundred and fifty acres sold to Mrs. Jemison makes part of a larger body of land, all of which was subject to the three concurrent judicial mortgages. In the contract between Mrs. Jemison and Mrs. Barrow, it was stipulated that if the other two creditors by judicial mortgage, did not release their mortgage rights *quoad* the six hundred and fifty acres conveyed to Mrs. Jemison, she was to be set back to the same ground she occupied before the contract; that is, if the other creditors having mortgages concurrent with her own enforced their mortgages, Mrs. Jemison was to fall back upon her mortgage rights in order to participate in the proceeds of the property when sold, and in that event she was to be compensated for the improvements she might make upon the land. Newgass enforced his mortgage, and the land was sold, but no release was made by him or by Mrs. Richardson of their mortgage rights, as to the land purchased by Mrs. Jemison. Irvine, the party who aimed to intervene, was the purchaser of the land, and it is alleged that he offered to secure to Mrs. Jemison the portion of the land purchased by her from Mrs. Barrow.

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It is insisted by the defendant that it is simply a case of warranty, that Mrs. Jemison has not been evicted, and therefore has no cause to complain. The contract of sale depending upon the will of Newgass and Mrs. Richardson, was dissolved of right as soon as they sought to enforce their mortgages.

We find no error in the judgment. The ruling of the court refusing to permit Irvine to intervene was proper; he clearly had no right to intervene.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

Rehearing refused.

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No. 3736.—J. J. WADE et al. v. C. C. PERCY et al.

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In the trial of an injunction suit to avoid the payment of the price of a tract of land, on the ground of a stipulation in the contract that the vendor was to perfect the title before he could enforce payment of the price, parol evidence is inadmissible to show the true intent of the parties in the clause authorizing the purchaser to withhold payment of the price until the title is perfected.

**A**PPEAL from the Seventh Judicial District Court, parish of West Feliciana. *Miller, J. Wickliffe & Fisher*, for plaintiffs and appellees. *Collins & Leake*, for defendants and appellants.

TALIAFERRO, J. The defendant Percy, holder of a promissory note, secured by mortgage given by plaintiff, Wade, in part payment of a tract of land he purchased from Percy, took out an order of seizure and sale of the land mortgaged, whereupon Wade enjoined the sale on several grounds, among which is the allegation that by the contract entered into by the parties the vendee Wade was authorized to withhold payment of the price until the vendor Percy furnished his vendee a full and complete title to the land. The defendant in injunction replies that the stipulation in regard to the furnishing a full and complete title had reference alone to perfecting it in regard to some right upon the land held by one Wimbish, and which had been released. The judge *a quo* perpetuated the injunction, and the defendant in injunction has appealed. An effort was made on the part of the defendant to show by parol evidence the true intent and purpose of the parties in the stipulation that the purchaser should withhold payment of the notes until the title was perfected, but the court sustained the objection to the evidence, and we think properly.

It is charged in the answer to the injunction suit that Wade well knew that the minors had a small mortgage upon the property he purchased, and yet in their brief the counsel of defendant say "neither Wade nor Percy had any knowledge of the tacit mortgage when the sale was passed, and hence they made no agreement as to this mort-

gage." Some stress is placed upon the fact that Wade paid one of the notes and three hundred and eighty-eight dollars on the second note, and was anxious to have the extension of time to pay the remainder written on the back of the note. The defendant admits that the minors' mortgage still subsists to the extent of nine hundred and ninety-one dollars and seventy-six cents. The plaintiff does not seem to have been in bad faith. He appears to have found it difficult to meet his payments, and to have been desirous to avoid being sued and to obtain time. But this was no waiver of his right under the contract to require a full and complete title to the land before making payment. This stipulation covered as well the unknown incumbrances on the property as those which were known.

We think the judgment of the lower court correct; and it is ordered that it be affirmed with costs in both courts.

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No. 3340.—GOTTLIEB NEIDHARDT v. JOHN B. HUNTERHEIMER.

An action to annul a judgment for want of citation can not be maintained, if it be shown that the person cited and the person who demands the nullity of the judgment are one and the same person.

The fact that the defendant has been cited by a different surname than his own will not avail, if it be shown that some called him by the name under which he was cited.

**A**PPEAL from the Second Judicial District Court, parish of Jefferson. *Pardee, J. Wm. Mithoff*, for plaintiff and appellant. *A. Cazabat* and *H. N. Ogden*, for defendant and appellant.

HOWE, J. This is a suit to annul a judgment for want of citation.

The defendant relied upon the exception of *res judicata*, among other defenses, and this exception was sustained by the lower court. The plaintiff has appealed.

We see no error in the judgment. The citation was addressed to G. Reinhardt; instead of G. Neidhardt. In an action to enjoin the sale of plaintiff's property under the judgment rendered on this citation, the sole question raised was whether or not Gottlieb Neidhardt and Gottlieb Reinhardt were identically the same person. The court decided that the plaintiff's name was Gottlieb, and that by way of surname some called him Neidhardt and some Reinhardt; and thereupon gave judgment for the defendant. This judgment was not appealed from and seems to have settled the question of identity. But, if Gottlieb Rheinhardt and Gottlieb Neidhardt were merely slightly different names of the same person; then the question of the validity of the citation was also finally determined, and became, necessarily, a thing adjudged.

Judgment affirmed.

Rehearing refused.

## No. 3533.—INES PEYROUX v. M. A. PEYROUX et als.

A decree of the probate court ordering the sale of succession property, can not be attacked collaterally by the heirs, in a proceeding to be recognized as the owner of the property which has been sold under it, on the ground that the order of sale was irregular and null. In a succession sale of property for the purpose of effecting a partition among the heirs, the appointment of a special tutor to each is unnecessary.

The appointment of another person than the one first designated to make the sale of succession property for the purposes of partition does not render the order of sale or the sale a nullity.

The purchaser of property at probate sale has nothing to do with the character of the judgment directing the sale of the property, whether such a decree be a judgment of partition is immaterial to the purchaser.

**A**PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Charles Lougue*, for plaintiff and appellant. *U. E. Schmidt*, for defendants and appellees.

**TALIAFERRO, J.** The plaintiff, as one of the heirs of her deceased mother, asks to be recognized as the owner of the one-seventh part of a square of ground in the Third District of New Orleans, now in possession of the defendant Jacob Badinger, which she alleges was illegally sold.

On the twenty-seventh of May, 1862, P. O. Peyroux as heir and administrator brought suit for the partition of the property held in common by him and his minor brothers and sisters, whose tutor he was. Experts were appointed to report whether or not the property was susceptible of partition in kind. They reported in the negative. The under-tutor, who was cited to represent the minors, answered that he could urge no objections to the demand for partition and as the experts had reported that it could not be made in kind, asked for a family meeting to fix the terms of sale. This family meeting advised the sale and fixed the terms. Their deliberations were homologated and the sale was ordered to be made accordingly by N. Vignie, auctioneer. Subsequently the administrator asked that his own name be substituted in place of that of the said auctioneer, which was done. The sale was made by him, and the piece of property in controversy was adjudicated to the defendant, M. A. Peyroux, who sold it to Baringer. The plaintiff prays that those sales be declared null as to her, on several grounds and from a judgment against her she has appealed.

The plaintiff by admitting that the acts under private signature, offered by defendant, were executed and delivered at the dates thereof and the signatures thereto were genuine, removed the objections made by her to their admissibility. The act of sale under private signature is admitted to have been recorded long before the institution of this suit.

Article 2234 R. C. C. provides that "all *proces verbals* of succession property, signed by the sheriff or other person making the same, by

the purchaser and two witnesses, are authentic acts." The one in this case was so signed. The change made by the court in the person appointed to make the sale does not in this instance affect the authenticity or admissibility of the *proces verbal*. The bills of exceptions are not well taken.

The alleged grounds of the nullity of the sale attacked are:

*First*—The judgment ordering the sale was rendered without trial, without motion or suggestion of the parties.

A decree or order of sale was rendered by the probate court, and it can not in this collateral way be attacked. 2 An. 509; 14 An. 413; 23 An. 500.

*Second*—The minors were not properly represented, because a special tutor to each was not appointed. This was unnecessary. Article 275 and not 1369, R. C. C. applies. See the case of *Emmer v. Kelly*, 23 An.

*Third*—The judgment could not be altered after rendition. The alteration referred to was the change in the person appointed to make the sale, which did not produce the nullity of the order of sale or the sale.

*Fourth*—It was not a judgment in partition. With this the purchaser at the auction sale has no concern.

*Fifth*—The defendant could not have acquired by just title.

This is corollary from the preceding grounds, and as they are not maintained it must fall.

It is therefore ordered that the judgment appealed from be affirmed with costs.

Rehearing refused.

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No. 3745.—*FURCY DEUCHATELL v. CHARLES L. ROBINSON.*

In a possessory action to recover possession of real estate, the plaintiff must show that he was in the peaceable possession of the property at the time the suit was brought, and that he has been disturbed in his possession by the illegal acts of the defendant.

**A** PPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. E. A. Hunter*, for plaintiff and appellant. *J. G. White*, for defendant and appellee.

*TALIAFERRO, J.* This is a possessory action. The plaintiff alleges that he is owner of a tract of land lying in the parish of Rapides, and that the same has been in the peaceable possession of his ancestors and himself together for a period of thirty years, but that recently he has been disturbed in the possession of it by the defendant, who has illegally gone upon the land and detains it from the petitioner. The answer denies both the plaintiff's possession and alleged disturbance. Judgment was rendered in favor of the defendant and the plaintiff has appealed.

We think the plaintiff has failed to make good his allegations of possession which is the gist of the action. A power of attorney from plaintiff to one Bruce is introduced in evidence, the purport of which is, that Bruce is authorized to take charge of the real estate of plaintiff, situated in the parish of Rapides, and to lease the same, collect rents, etc. This act is dated the tenth of December, 1869. It is not shown that the agent ever had the land in question in possession. On the contrary, the defendant proves by a witness who testifies that he has known the place, the possession of which is in controversy since 1860, that neither the plaintiff, his father, nor Bruce, the plaintiff's agent, has ever resided upon or had possession of the land to the witness' knowledge. That for three years immediately preceding the commencement of the defendant's possession, the land was continuously in possession of other parties authorized by Governor Wells to occupy it. The plaintiff's evidence, it is clear, does not enable him to maintain a possessory action.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

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No. 3473.—BOLIVAR EDWARDS, District Attorney, etc., v. JOHN EVANS.

Section nine of the Revenue Act of 1871, which gives the Governor the power to appoint tax collectors in the different parishes of the State who are to hold their offices for the term of two years, does not vacate the offices of tax collectors, who were appointed under the Revenue Law of 1870 for the term of two years. An appointment of a person as tax collector under the law of 1871, who had previously been appointed to the same office under the law of 1870 and rejected by the Senate, was therefore in conflict with article sixty-one of the Constitution which forbids the appointment of any person to the same office during the recess of the Senate, who had been rejected by that body.

**A**PPEAL from the Sixth Judicial District Court, parish of Tangipahoa. *Ellis, J. Bolivar Edwards*, District Attorney, for plaintiff and appellee. *Emmett D. Craig*, for defendant and appellant.

Howe, J. By the tenth section of the Revenue Act of 1870, 131, it was provided that for the several parishes of the State, except the parish of Orleans, the Governor should nominate, and by and with the advice and consent of the Senate, appoint one tax collector for the term of two years, which appointment should date from the first Monday of April, 1870, and should be made every two years thereafter.

Under this provision the defendant was appointed tax collector of the parish of Tangipahoa.

At the session of 1871 his name was sent in to the Senate, and the nomination rejected. The nomination was again sent in, but for some reason was not acted on.

By the Revenue Act of March 3, 1871, it was provided that for each of the parishes of the State, except the city of New Orleans, the

Governor should *upon the expiration of the term of office* of the present incumbents, or in case of *vacancy from any cause* whatever, nominate, and, by and with the advice and consent of the Senate, appoint one tax collector, which appointment should date from the first Monday of January, 1871, and should be made every two years thereafter.

Under this provision the defendant on the third of March, 1871, was again appointed tax collector of Tangipahoa.

The only question necessary to consider in this case is whether this last appointment was made in contravention of article sixty-one of the Constitution which declares, that "no person who has been nominated for office, and rejected by the Senate, shall be appointed to the same office during the recess of the Senate."

We understand from the argument that the defendant was appointed in March, 1871, upon the hypothesis that the act of 1871 above quoted established practically a new office in which there was an "original vacancy," and that his appointment therefore was not in violation of the sixty-first article of the Constitution.

We are constrained to think that the appointment of March, 1871, was made in error. The act of 1871 did not create a new office of tax collector, nor did it abolish the old one. It merely provided a method of filling vacancies in the office, whether occasioned by expiration of term or otherwise; and fixed a time for which the appointees to such vacancies should hold. *State v. Kreeder*, 21 An. 482.

In this view we see no error in the judgment against the defendant. Judgment affirmed.

Rehearing refused.

#### No. 3741.—JAMES M. WELLS v. SIMON SIESS.

In this case the plaintiff gave to his two sons a certain amount of money, which was placed in the commercial firm as the money which they had bound themselves to put into the house, for which a note of the firm was given. The plaintiff now seeks to hold the defendant, a member of the firm, liable as a commercial partner, *in solido*, for the note.

Held—That the money for which the note was given being placed in the firm by the plaintiff, as capital which was to be paid in by his two sons, payment of the note could not be enforced against the other member of the firm, the defendant in this case, as an obligation *in solido*.

**A**PPEAL from the Seventh Judicial District Court, parish of Avoyelles. *Miller, J. E. North Cullom*, for plaintiff and appellee. *Waddill, Barbin & Taylor*, for defendant and appellant.

HOWE, J. This is an action on a promissory note executed in the name of Wells Bros. & Co., July 29, 1864, to the order of plaintiff, the defendant being sued as a member of the commercial firm. There was judgment for plaintiff, and the defendant appealed.

The firm of Wells Bros. & Co. was composed of Thomas M. Wells,



Levi Wells, and Simon Siess the defendant. By the articles of copartnership of July 29, 1864, the Wells were to furnish \$30,000 of capital, the defendant his personal services only.

The plaintiff sketched the articles, and was familiar with the objects and intentions of the partners, two of whom were his sons. The note in suit bears even date with the articles of partnership, and was signed by Levi Wells for the firm. It never appeared on the books of the firm.

Levi Wells, a witness for plaintiff, testifies that he signed it on the day it was dated, when a check for its amount was given by plaintiff and that it (the note) was given for a part of the capital agreed to be furnished to the firm by his brother and himself. The plaintiff himself says: "The money loaned by witness to the firm was advanced in order to carry out the obligation of the contract of partnership of July 29, 1864." The defendant declares that he never heard of the note in suit until he was cited in this action.

The whole evidence forces us to the conclusion that the plaintiff advanced the amount of the note to his two sons to enable them to comply with their agreement to pay in a certain amount of capital to the firm; that though the amount eventually went to the use of the firm it went as a contribution from the two partners, and not directly as a loan from plaintiff, and that the defendant can not be held liable. Parsons on Mercantile Law, p. 179, and cases cited; *Smith v. Senecal*, 2 Rob. 453.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of defendant with costs in both courts.

NO. 3799.—EUGENE BREAUX et al. v. LAUVE & MCCALL.

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An obligation given by a commercial firm to a third party, acknowledging an indebtedness, on account of land speculations between the parties, conditioned that it is to be paid out of the proceeds of the lands when sold, is suspensive in its character, and can not be enforced until the lands have been sold.

A suit for partition may, however, be entertained to divide the lands in kind, among the different claimants, and if a judicial sale is necessary to effect a partition, then, and in that case, the suspensive obligation may be enforced against the proceeds of the sale.

**A** PPEAL from the Fifth Judicial District Court, parish of Iberville. *Posey, J. Barrow & Pope*, for plaintiffs and appellees. *A. & E. B. Talbott*, for defendants and appellants.

**TALIAFERRO, J.** This is an action by the representatives of Thomas Mille against Jones McCall and the representatives of Omer Lauve, who, with Jones McCall, composed the former copartnership of Lauve & McCall, for a partition of certain lands owned in common between the commercial firm of Lauve & McCall and Thomas Mille, and also

for the payment out of the proceeds of the sale of the property the obligation of Lauve & McCall to Mille for the payment of \$7552 54, with eight per cent. interest from twenty-third March, 1855. McCall, and a part of the heirs of Lauve resist the claim of the plaintiffs and against the obligation to pay \$7552 54, they plead the prescription of five and ten years. Of the other defendants, some acquiesce in the prayer for partition, others desire a partition in kind, and some answer by general denial.

The judgment of the lower court decreed a partition by sale, and directed the manner of making it, overruled the plea of prescription and ordered payment of the sum claimed to be made out of the proceeds of sale accruing to McCall and the heirs of Lauve. From this judgment McCall has appealed.

It appears that in the year 1854 a written agreement was entered into between Thomas Mille and the firm of Lauve & McCall for the purpose of buying public lands on speculation in equal shares between the partnership and Mille, the funds to make the entries with to be furnished by Mille, and Lauve & McCall were to execute their note for the payment of their half interest in each and every entry, payable proportionally as the lands are sold or disposed of. In March, 1855, Lauve & McCall executed the obligation sued upon in the following terms:

"NEW ORLEANS, March 23, 1855.

"We, the undersigned, acknowledge to be indebted to Mr. Thomas Mille to the sum of seven thousand seven hundred and fifty-two dollars and fifty-four cents, with interest at the rate of eight per cent. per annum for one-half of his disbursements in our account land speculations made between us and him as per agreement of the first day of July, 1854, duplicate of which is deposited in the hands of the interested parties; said sum, interest and expenses to be reimbursed to said Thomas Mille, proportionally, as the lands entered and purchased are sold or otherwise disposed of.

"(Signed)

LAUVE & MCCALL."

Indorsed: "New Orleans, March 7, 1860.

"We, the undersigned and drawers of the within note waive prescription of said note.

"(Signed)

LAUVE & MCCALL."

It is argued on the part of the plaintiffs that the action on the obligation is not prescribed, as the term for its performance has not arrived. The \$7752 54 are to be paid proportionally as the land entered and purchased are sold, or otherwise disposed of; and the lands remain unsold, and have not been otherwise disposed of. The recovery of the sum specified out of the proceeds of the lands when sold, the plaintiffs contend is incidental to the partition, and the action of partition is not prescribed.

Breux et al. v. Lauve &amp; McCall.

We think the case is with the plaintiffs. The obligation is clearly one contracted on, a suspensive condition depending on a future event, which has not yet taken place, viz: the sum expressed is to be paid proportionally as the lands entered and purchased are sold. It is not shown that any of the lands acquired by the parties under their agreement were ever sold. Mille, it appears, died in 1856, and the lands have remained in an undivided state ever since.

It is ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

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NO. 3725.—VALÉRY LEDOUX v. JÉRÔME J. DUCOTÉ.

The act of the General Assembly authorizing the parish judges to grant orders of seizure and sale, in the absence of the district judge, is constitutional.

An order of seizure and sale granted by a parish judge, in the absence from the parish of the district judge, on sufficient and authentic evidence is therefore obligatory and binding upon the parties in interest.

**A**PPEAL from the Seventh Judicial District Court, parish of Avoyelles. *J. M. Edwards*, Parish Judge. *Irion & Thorpe*, for plaintiff and appellee. *Edwards & Ducoté*, for defendant and appellant.

WYLY, J. On seventh June, 1869, the plaintiff sold to François Bettevy a tract of land in the parish of Avoyelles for \$3680, evidenced by the promissory note of the latter payable on first January, 1871, secured by special mortgage on the property.

Subsequently the purchaser sold part of the land to the defendant, Jerome J. Ducoté, and as part of the price he assumed to pay \$2000 on the note for \$3680 held by the original vendor, the plaintiff, and in order to secure the punctual payment of the same the defendant specially mortgaged and hypothecated the property which he purchased.

On the latter mortgage the plaintiff sued out an order of seizure and sale.

From this the defendant appeals, and contends that the order should be set aside for the following reasons:

*First*—The order of seizure and sale was not justified by the evidence accompanying the petition.

*Second*—The property really affected by the mortgage is held by Bettevy the vendor of the appellant.

*Third*—That the parish judge could not issue the order of seizure in the absence of the district judge, because the law authorizing it is unconstitutional, being violative of article 87 of the constitution.

We find that the note and an authenticated copy of the act of mortgage given by Bettevy, and also a certified copy of the act of mortgage given by the defendant were attached to the petition. The judge

therefore had authentic evidence of the debt of \$2000 assumed by the defendant, and also of the mortgage which he had given on the property purchased to secure the payment of the same.

There was sufficient evidence to justify the order.

If the defendant does not own the property proceeded against he has no right to complain.

As to the constitutionality of the act authorizing the parish judge to grant orders of seizure and sale in the absence of the district judge, we will remark that, in our opinion, the statute is constitutional.

Article 91 of the constitution declares that: "The General Assembly shall have power to vest in the parish judges the right to grant such orders and do such acts as may be deemed necessary for the furtherance of the administration of justice; and in all cases the power thus granted shall be specified and determined."

Judgment affirmed.

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No. 3610.—GEORGE STEWART v. JANE ROBINSON.

If an injunction has been obtained against the enforcement of a judgment and the evidence given on the trial of a rule to dissolve it shows clearly that the plaintiff had no grounds for injunction, then damages will be given against the plaintiff in injunction, regulated by the amount of the judgment enjoined.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. B. O. Elliott*, for plaintiff and appellant. *V. O. King and R. King Cutler*, for defendant and appellee.

**TALIAFERRO, J.** This case was before the appellate court in January, 1871, 23 An. 83, upon an injunction taken out by the defendant to stay an order of seizure and sale, issued at the suit of the plaintiff and under which the sheriff had seized several town lots in the city of Jefferson, mortgaged to secure the payment of a note for the sum of \$1276 90, with interest. The judgment of the lower court, dissolving the injunction, was affirmed by this court. After filing the mandate in the court below the plaintiff renewed the seizure, and was again opposed by a second injunction, which forms the basis of the present action. There was an intervention filed in the case by a Miss Boyle, which was dismissed.

The grounds stated by defendant for the injunction are:

*First*—That under a writ of seizure and sale and a writ of *fieri facias*, issued by plaintiff on the fifteenth of February, 1871, the property of defendant was seized and advertised to be sold on the eighth of April following; but that the sheriff illegally postponed the sale so advertised to the thirteenth of May, then next ensuing, without the consent the defendant and to her detriment.

*second*—That no legal sale of the property could be made under the

Stewart v. Jane Robinson.

writ of *fi. fa.* on the thirteenth of May, because it had expired, no return or renewal of the writ having been made.

*Third*—That defendant had no notice to appoint an appraiser, a right which she claims under article six hundred and seventy-one of the Code of Practice.

The defendant in injunction took a rule upon the plaintiff to show cause why the injunctions should not be dissolved. Upon trial of the rule, the injunction was dissolved, and from that judgment the defendant in the suit appealed. The grounds set up by the defendant for suing out this injunction are not sustained by the evidence in the record. A suspension of the writ of *feri facias* it seems occurred from the intervention of Miss Boyle, claiming the property as owner, but it is shown that at the expiration of the writ, about the last of April, it was duly returned, and a duly certified copy obtained from the clerk as required by law, the seizure being preserved. The record shows that the defendant had notice to appear and appoint an appraiser.

The appellee prays that the judgment of the lower court be amended by allowing him twenty per cent. damages against the appellant for an abuse of the remedy of injunction and for vexatious delay in enforcing his claim. The evidence shows that the plaintiff had no grounds for the injunction.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be amended so as to condemn the plaintiff in injunction, and her sureties on the injunction bond, *in solido* to pay the plaintiff as damages ten per cent. upon the amount of the judgment, the enforcement of which was enjoined, and as thus amended that the decree of the court *a qua* be affirmed with costs.

Rehearing refused.

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No. 3775.—AR. MILTENBERGER v. J. WITHEROW, Curator.

The act of Congress of June, 1864, which suspended the prescription of actions in cases where the creditor resided within the limits of the adhering States and the debtor resided within the limits of the insurrectionary States, during the late war, does not apply to cases where the creditor and debtor both resided within the limits of the insurrectionary States.

Prescription once acquired in favor of an estate can not be waived by an acknowledgment of the claim by the administrator.

**A**PPPEAL from the Thirteenth Judicial District Court, parish of Madison. *Hough, J. Jacob C. Seale*, for plaintiff and appellant. *E. D. Farrar*, for defendant and appellee.

HOWELL, J. The plaintiff has appealed from a judgment sustaining the plea of prescription to his action on an account for money furnished to Robt. Ramsey, deceased, to purchase plantation supplies and the commissions thereon from ninth August, 1861, to eleventh July,

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Miltenerger v. Witherow, Curator.

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1862. He relies upon the proof that in 1863 the debtor went to Texas where he died; that from the month of March, 1863, to November, 1865, no suit could have been brought in the courts of Madison parish, the residence of said Ramsey, up to the time of his going to Texas, and that one N. D. Coleman, as administrator, on the eighth November, 1866, wrote upon the account the approval thereof to be paid in due course of administration; and he also invokes the act of Congress, eleventh June, 1864, suspending prescription. This act of Congress can not apply, the residence of the parties being in this State, and as the evidence shows, within the Federal lines of occupation during the time. Admitting that N. D. Coleman was legally appointed the administrator of Ramsey's succession, the account was prescribed at the time he acknowledged it, according to the established jurisprudence of this State, and he had no power to waive prescription already acquired in favor of the succession.

None of the grounds urged by plaintiff can be accepted as interrupting or suspending the prescription in this case.

Judgment affirmed.

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No. 3643.—J. BADEAUX v. E. W. BLAKE.

If the amount involved does not exceed five hundred dollars, exclusive of interest, the district courts for the State are without jurisdiction. Constitution, art. 85. A suit for an amount less than five hundred dollars was therefore properly dismissed for want of jurisdiction, although the accrued interest when added to the principal exceeded that sum.

**A** PPEAL from the Fifteenth Judicial District Court, parish of Lafourche. *Thomas P. Sherburne*, Judge *ad hoc*. *Isaiah D. Moore*, for plaintiff and appellant. *F. S. & J. S. Goode*, *Louis Bush*, *Louis Guion* and *A. F. & Clay Knobloch*, for defendant and appellee.

HOWELL, J. The defendant is sued as indorser for the sum of \$811 78, it being the amount of a note for \$413 37, and accrued interest. He pleaded to the jurisdiction of the court, and plaintiff has appealed from the judgment sustaining the plea.

Article 85 of the constitution provides that, "the original jurisdiction of the district court extends to all civil cases when the amount in dispute exceeds five hundred dollars, *exclusive of interest*."

The amount in dispute in this suit, exclusive of interest, does not exceed five hundred dollars, and hence the district court is not vested with jurisdiction. See 22 An. 459. The above language of the constitution is plain and unequivocal. The question before us is not whether the parish court may or may not have jurisdiction of the case, but whether the district court had. It is clear it had not.

Judgment affirmed.

Rehearing refused.

## No. 3841.—ILLAT NEWELL v. H. S. BUCKNER.

If two appeals have been taken from different judgments, rendered at different times between the same parties, and founded upon the same cause of action, the one devolutive and the other suspensive, and both appeals are presented in one record, the appeals will not be dismissed on that account, if both appeals are susceptible of being passed upon at the same time.

A mortgage given by an heir on his interest in his mother's estate to secure a debt of his father's to a third person (unless it is so expressed), is not a relinquishment of his legal mortgage on the property of his father, for debts due him by his father as tutor. And in case the father's property is sold by his creditor, the heir's preference to the proceeds of the sale, as a prior and preferred mortgage creditor can not be defeated on the ground of relinquishment of his mortgage rights by going security for his father.

**A** PPEAL from the Thirteenth Judicial District Court, parish of Tensas. *Hough, J. Farrar & Reeves* and *W. B. Spencer*, for plaintiff and appellant. *Labatt & Aroni*, for defendant and appellee.

HOWELL, J. H. S. Buckner caused a writ of seizure and sale to issue against Thomas M. Newell and the Shackleford plantation to be seized. Illat Newell enjoined the sale of the undivided half thereof, claimed by him, on the ground that having mortgaged his half as an additional security for the debt of Thomas M. Newell, his father, he is not personally bound and is entitled to the benefit of discussion; he also claimed by way of third opposition in the same proceeding the proceeds of his father's half, by preference, by virtue of a judgment against his father as tutor with mortgage superior to that of Buckner, who answered that Illat Newell has by notarial act relinquished all his claim upon said plantation in favor of the mortgage which he is enforcing, and denied the valid existence of said Illat's claim and mortgage against his father. Judgment was rendered on twenty-fifth October, 1870, dissolving the injunction, sustaining the plea of discussion, and ordering the sale of Thomas M. Newell's half, and if the proceeds thereof are not enough to satisfy Buckner's claim, then Illat Newell's half to be sold to pay the balance. No specific reference is made in this decree to Illat's demand for the proceeds of his father's half by preference. From this judgment Illat Newell took a devolutive appeal on twenty-fifth September, 1871.

In the mean time the property was again advertised, and each half adjudicated to Buckner on first July, 1871. Pending the advertisement, Illat Newell filed a sworn petition of third opposition, claiming the proceeds as before. To this the plea of *res judicata* was opposed and sustained on eighteenth April, 1871. From this judgment Illat Newell took a suspensive appeal on twenty-seventh April, 1871.

A motion is made to dismiss the appeal herein, on the ground that it is impossible for this court to pass on the matters involved in this form, there being two distinct actions in which judgments were rendered and appeals granted at different terms of the court, and all blended in one record.

If it be possible for us to pass intelligently on the matters presented by these two appeals, the motion can not, by its own terms, be sustained. As they have been ably argued both orally and by brief, we will endeavor to dispose of them.

As to the plea of *res judicata* presented in the suspensive appeal, taken on twenty-seventh April, 1871, it need only be said that the proceedings, embracing it, present the questions and rights which upon this branch of the controversy are presented in the devolutive appeal taken from the first judgment between the same parties, and maintaining the plea would not preclude an examination of said questions, which are regularly before us on said devolutive appeal.

The only question of any practical importance is the right of preference and priority asserted by Illat Newell to the proceeds of his father's half of the plantation sold, and its solution depends on the construction of the act of mortgage executed by said Illat Newell as security for his father's debt. This act may be considered as a part of, or supplement to the one executed by his father, in which the latter bound himself to procure its execution, and it declares that, "in order to secure the payment of the said sum of nineteen thousand and seventy-eight dollars and fifty-four cents, the amount of the three promissory notes aforesaid, and in order also to secure the payment of all lawyers' fees not exceeding five per cent. on the amount for which it may be necessary to institute a suit, he, the said Illat Newell, does by these presents specially mortgage and hypothecate in favor of the said firm of Buckner, Newman & Co., and any and all future holder or holders of said notes or either of them, all and singular, his right, title, interest, share, property, claim and demand of any nature and kind whatsoever of, in and to the property referred to," etc., describing the property seized, which had been mortgaged by his father, Thomas M. Newell, as his property. The above act contains the clause that the mortgageor will not "alienate or encumber the interest in said plantation, which he has or may hereafter have, to the prejudice of this mortgage."

In the foregoing language or any other part of the said act, we can discover nothing which is equivalent to a relinquishment or renunciation of his mortgage rights against or upon his father's property arising from the tutorship or otherwise, but simply a mortgage upon what was susceptible of being mortgaged, his rights in and to the real property, and this was given as additional security to that given by his father in the act of mortgage executed by him, and that mortgage operated only upon his father's property, which was then subject to the minor's mortgage. A renunciation of a right is not to be presumed.

It is the fact that Illat Newell demanded the benefit of such renunciation, for in the same petition he asserted his



Newell v. Buckner.

right of mortgage. The record satisfies us that Illat Newell has not lost his superior right of mortgage upon the half of the land sold, which belonged to his father, and that he is entitled to the proceeds thereof, which are not sufficient to satisfy his claim.

It is therefore ordered, that the judgment rendered herein on eighteenth April, 1871, and so much of the one rendered on twenty-fifth October, 1870, as disallows or denies the preference and priority asserted by Illat Newell, plaintiff to the proceeds of the half of the land sold herein as belonging to Thomas M. Newell, and condemns plaintiff to pay costs, be reversed, and it is now ordered that the said right of preference and priority be recognized, and that the proceeds of the one-half of the "Shackleford plantation," sold by the sheriff of the parish of Tensas, on the first July, 1871, as the property of Thomas M. Newell, be paid to the plaintiff, Illat Newell, with costs in both courts.

Rehearing refused.

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No. 3851.—MARY E. BROWN and HUSBAND v. JAMES A. VENTRESS,  
Dative Testamentary Executor.

A dative testamentary executor will be removed from office, if it be shown that he has disobeyed the orders of the court directing him to file an account within a given time, or that he has otherwise neglected or refused to discharge the duties imposed upon him as testamentary executor.

**A**PPEAL from the Parish Court of the parish of Iberville. *A. Petit*, Parish Judge. *Mathews & Wailes*, for plaintiffs and appellees. *Barrow & Pope*, for defendant and appellant.

**TALIAFERRO, J.** This is a suit to remove from office a dative testamentary executor, and for judgment against him for ten per cent. per annum on all sums he may be found liable for in that capacity. The action is brought by one of the heirs of James N. Brown, who died in 1859, leaving a large estate, the principal part of which is situated in the parish of Iberville. He appointed as executors of his will, John N. Brown, a son, and Gilbert S. Hawkins, a friend of the testator. Both the executors died within three or four years after the opening of the succession, and in December, 1864, the defendant was appointed dative testamentary executor, and he qualified as such by entering into bond and taking the oath required by law. The testator directed that certain real estate he owned in Baton Rouge and New Orleans, should be sold; that after the payment of his debts and certain legacies, the mass of his property consisting chiefly of two large sugar plantations should be kept together until his youngest child became of age, the plantations to be cultivated, and the net annual revenue to be equally divided among his heirs. The plantations have been superin-

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Mary E. Brown and Husband v. Ventress, Dative Testamentary Executor.

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tended and cultivated by the defendant since he came into office as dative testamentary executor. No account was filed by the executors appointed by the will. On the sixteenth of November, 1869, the plaintiff obtained an order of the probate court of Iberville, directing the defendant to file an account of his administration as dative testamentary executor, which he had failed and neglected to do prior to that time. The order then rendered was tardily obeyed. No account was filed until the fifth of October, 1870. On the twenty-fourth of that month he filed a second account, and on the sixteenth of October, 1871, he filed a third account. These accounts were promptly and vigorously opposed, and it seems no judgment has been rendered on the oppositions.

This suit to remove the defendant from office was filed on the third of October, 1870, two days before he filed his first account, and nearly a year after the order was rendered directing an account to be filed.

The grounds upon which the defendant is sought to be removed, are :

*First*—That he has been unfaithful in his administration of the estate of James N. Brown.

*Second*—That he has made use of money and property entrusted to him as dative testamentary executor for his private account.

*Third*—That he has neglected and failed to obey the order of this court commanding him to render a full, fair and perfect account of his administration.

*Fourth*—That the sureties on his bond as dative testamentary executor are insufficient, and that he has failed to account for the proceeds of the plantations under his charge amounting to \$275,000.

A judgment was rendered by the judge *a quo*, dismissing from office the defendant, but he did not feel authorized under the allegations of the petition to impose upon him the penalties prescribed by statute. From this judgment the defendant has appealed.

We think the evidence in the record abundantly justifies the decree of dismissal. For about five years before he was called upon for an account he had never presented one; and, after an order was rendered for the purpose of compelling him to account, another year elapsed before he complied, the account then filed being the first during his administration.

Whatever obstacles may have been presented to the executor's efficient and careful discharge of his duties during the confusion and trouble arising from the war, there was nothing in his way for several years after it ended to prevent him from complying with the law requiring executors to render an account annually. Revised Statutes, sec. 1465.

own that the dative testamentary executor made a surrender

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of his property in March, 1865, claiming the benefit of the insolvent laws, that one of his sureties has since gone into bankruptcy, and that the other owns no property.

Upon the whole, it is clear, from the entire evidence adduced by the plaintiffs in support of their allegations, that sufficient grounds are shown for the removal of the defendant from the office of dative testamentary executor of James N. Brown.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

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No. 3311.—W. S. DONNELL et als. v. E. GANT et als.

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The recording of an abstract of an inventory of a deceased wife of a man named, fixes the presumption of the existence of minors whose rights are preserved by the recording of the abstract, and the recording of such an abstract is sufficient notice to third persons, of the existence of a tacit mortgage, resting upon the property of survivor in favor of the minors.

**A**PPEAL from the Seventh Judicial District Court, parish of Pointe à Coupée. *Miller, J. Cooley & Philips*, for plaintiffs and appellants. *Thomas H. Hewes*, for defendants and appellees.

HOWELL, J. Justus Reynolds, the father and natural tutor of several minor children, resigned his tutorship on the twenty-eighth of March, 1860, and the grandmother of said children was appointed tutrix. On the twenty-fourth of June, 1867, she obtained judgment against Reynolds for \$6596 03, with legal interest from the seventeenth of January, 1861, costs and legal mortgage, and caused it to be recorded on the twenty-eighth of June, 1867. On the seventh of December, 1869, she obtained judgment against one Nasworthy Bell, as third possessor, to whom Reynolds had sold a plantation in February, 1860, and an order to sell said property to satisfy the judgment against Reynolds. At the sale on the fifth of February, 1870, the property was adjudicated to the defendant Gant, and all mortgages were erased by the sheriff, and Gant issued a monition and obtained the homologation of said sale. Among the mortgages canceled by the sheriff were two judicial mortgages against Bell in favor of these plaintiffs, and recorded on the thirteenth of January, 1868. They now sue to have their said mortgages reinstated and enforced against the said property and any mortgages in favor of the minor children of Reynolds declared null.

They contend, very properly, that the recording of the judgment in favor of the tutrix, in June, 1867, did not operate a judicial mortgage upon the property in question, as it had been sold long before by Reynolds to Bell, and that the only right of mortgage in favor of

the minors depends on a compliance with the law of 1869, prescribing the mode of preserving such mortgages. This, they say, has not been done.

The law on this subject is found in section eleven of act ninety-five of 1869, which requires the clerks "to make out an abstract of the inventory of the *property of all minors* whose tutors have not been required by law to give bond for their tutorship, such abstract to *describe the real property*, and give the *full amount of the appraisement of all the property*, both real and personal, and rights and credits," which must be recorded in the mortgage book before the first of January, 1870.

On the eighth of November, 1869, the following document was recorded :

" State of Louisiana, parish of Pointe Coupée.

" Extract of inventory of the succession of Mary F. Fontenot, wife of Justus Reynolds, made by John Mosbins, recorder, on the tenth of January, 1861 :

" Appraisement of slaves and amount of inventory :

" Nine thousand two hundred dollars (\$9,200.)

" I, the undersigned deputy clerk of the Seventh Judicial District Court, in and for the parish and State aforesaid, duly qualified, do hereby certify the above and foregoing to be a true and correct extract of the original inventory of said succession of Mary F. Fontenot.

" Pointe Coupée, October 25, 1869.

"(Signed)

H. J. LEDOUX, Deputy Clerk."

It is objected that this is insufficient, because it does not show against whom and in favor of whom the mortgage is recorded, it not appearing that Mrs. Reynolds left minor children, which can not be presumed, or that Justus Reynolds was their tutor if there are any; and further, that what was secured, if anything, is the value of slaves, which could not be recovered, the object of registry being to inform third persons on these three points.

Prior to the constitution of 1868, third persons were entitled to no information in this respect as to the existence of mortgages in favor of minors. That instrument declared that such mortgages, existing at the date of its adoption, should cease to have effect against third persons after the first of January, 1870, unless duly recorded, and made it the duty of the legislator to provide for their registration. That provision is contained in the section above cited, and by its terms such mortgages upon the property of certain tutors are preserved so as to have effect against third persons, if an abstract of the inventory of the minors' property, containing a description of the *real property* and the appraisement of *every kind of property*, is recorded within the prescribed time. The purpose of the law is to show that a mortgage

exists upon the tutor's property in favor of minors and to what extent. When therefore, in conformity with this law an abstract is made as in this case of the inventory of a deceased wife of a man named, we must presume the existence of minors, whose rights are to be preserved, otherwise the clerk and recorder would be doing a vain and unauthorized thing. If there should be no minors no mortgage would attach; but the recording of such an abstract notifies third persons that a tacit or legal mortgage rests upon the property of the survivor in favor of any minor heirs of the decedent, and they deal with him with such knowledge.

In this instance a tacit mortgage existed prior to 1870, and we think there has been a compliance with the law providing for its preservation as against third persons.

As to the last objection, it is sufficient to say that the judgment has been executed, and it is too late to inquire into the consideration on which it was based.

It is therefore ordered that the judgment appealed from be reversed and that there be judgment in favor of defendants rejecting the demand of plaintiffs with costs in both courts.

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No. 3650.—STATE v. TONEY FORNEY.

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The phrase "with malice aforethought" is not sacramental in an indictment for a statutory offense, where the accused is charged with feloniously and maliciously, while lying in wait, with shooting his victim, with the intent to commit murder.

In such a case, Held—That the accused not being charged with having committed at one time, two offenses, whose combination creates a capital offense, it is not necessary to define the offense of murder, but that the idea of malice aforethought is necessarily implied in the use of the word "murder."

The fact that one of the jurors is allowed to leave the court room for a necessary purpose, who returns before the panel is complete, or any evidence has been given, is not such a separation of the jury as will vitiate the verdict.

**A** PPEAL from the Eighteenth Judicial District Court, parish of Bossier. *Watkins, J. T. E. Paxton*, District Attorney, for the State. *J. R. Griffin*, for defendant and appellant.

Howe, J. The defendant was indicted for shooting with intent to kill and murder, while lying in wait, under section 790 of the Revised Statutes of 1870, and having been found guilty without capital punishment and sentenced accordingly, has appealed.

He makes two points here, firstly, that the indictment is totally defective, and secondly, that there was on the trial a separation of the jury which in a capital case vitiates their verdict.

*First*—We do not perceive that the indictment is deficient, either in the specification of the time the crime was committed, or of the elements of the crime itself.

It is alleged that the offense was committed on the thirtieth day of June, 1871, and the unnecessary use in the latter portion of the same sentence of the phrase "on or *about* the said thirtieth day of June, 1871," can not be considered as anything but harmless tautology.

The specification of the offense is that the accused "willfully, feloniously and maliciously while lying in wait \* \* did shoot, to wit, with a shot gun, with the intent to kill and murder, one M. D. Dennison, in the peace of the State then and there being, contrary to the form of the statute," etc., etc.

The offense is statutory and appears to be fully described. It is averred that the defendant lay in wait; that he shot the object of his crime, that he did this willfully, feloniously and maliciously, and that he did it with intent to murder his victim.

The appellant contends that the use of the phrase "with malice aforethought" is sacramental, and that its omission is a fatal defect. We can not assent to this view. The defendant is not accused of having committed at one time two offenses, whose combination creates a compound and capital one (as in the case of Brown, 21 An. 347.) It is not therefore necessary to define the offense of murder as if he were indicted for that also. He did not commit that offense, when the description of what he did is given as above, and it is charged that his intent was to murder the person of whom he lay in ambush, and whom he wounded, the idea of malice aforethought is necessarily implied in the use of the word "murder," and the defendant amply advised of the charge against him.

*Second*—Nor do we think there was such a separation of the jury in this case as would vitiate a verdict.

Before the jury had been completed and empaneled, and of course before the indictment had been read to them or any evidence adduced, one of the nine who had been sworn, left the court room for a necessary purpose and went into an adjacent alley. He was not out of the view of the sheriff more than ten seconds. He spoke to no one. The sheriff observed that there was no one else in the alley. He returned to his seat before the trial began. In such a case we think it would be pushing technicality too far to say that the verdict should be set aside, for there is no room for any reasonable hypothesis of misconduct. In each of the cases of Hornsby, 8 Rob. 554; Crosby, 4 An. 435; Evans, 21 An. 321, and Frank, 23 An. 213, cited by defendant, there was a real separation of the jury after the trial had begun and evidence had been taken, and there was a strong and perhaps conclusive presumption of misconduct. But in the present case we see no such reason for a new trial.

Judgment affirmed.

## No. 3758.—PIERRE AILLET v. JAMES C. WOODS.

A note given in renewal of one which is secured by a vendor's privilege on real estate is not a novation of the debt, nor is the privilege lost. But if the mortgage has not been reinscribed within ten years, then the vendor's privilege would be postponed to other mortgages of prior date to the reinscription. 2 An. 100.

**A** PPEAL from the Fifth Judicial District Court, parish of West Baton Rouge. *Posey, J. Barrow & Pope*, for plaintiff and appellee. *H. M. Favrot*, curator *ad hoc*, appellant.

**Howe, J.** This is a suit upon a promissory note drawn as follows, to wit:

"\$1000.

WEST BATON ROUGE, March 1, 1861.

"Five years after date I promise to pay to the order of Mr. Pierre Aillet, the sum of one thousand dollars, loaned money, with five per cent. interest from date, payable annually in the month of March, and if the interest should fail to be paid, then the principal and interest, both due.

"(Signed,)

JAS. C. WOODS."

The suit was filed December 3, 1866, and citation served on defendant on the fifth. An amended petition was filed on April 4, 1867, alleging that the note sued on was given in renewal of one originally given by defendant to plaintiff for the purchase price of a tract of land, and bearing vendor's privilege of date the twentieth of July, 1854.

Upon suggestion that the defendant had become an absentee, a curator *ad hoc* was appointed to represent him.

The defense is a general denial, novation, and a plea of five and ten years' prescription and the judgment was rendered in favor of plaintiff, with recognition of his vendor's privilege on the property described in the act of sale. The curator *ad hoc* has appealed.

There is evidence in the record to show that the note was given as alleged by plaintiff in renewal of one having a vendor's privilege on the land described, and we do not perceive any force in the pleas of novation and prescription.

The act of sale of the land was recorded July 20, 1854, and reinscribed November 10, 1865. The privilege may have been postponed by preemption, to the claims of other privileged or mortgage creditors of defendant, but it was not necessarily lost as to the defendant himself. Rev. C. C. 3369, *Shepherd v. Orleans Press*, 2 An. 113. The principal debt seems to have been kept alive; no other creditor is before us and we do not see clearly what practical interest the defendant has in the only question which he discusses with much earnestness, namely: whether the judgment was correct in according a vendor's privilege on the land.

Judgment affirmed.

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24	194
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No. 2529.—JOHN ARROWSMITH v. THE CITY OF NEW ORLEANS. Suits Nos. 19,768 and 107 consolidated.

This suit is brought by the plaintiff to recover from the city of New Orleans certain parcels of ground which it is alleged the city has taken possession of for the use of public streets and highways. The evidence offered on the trial shows that for more than thirty-two years prior to the institution of this suit the plaintiff has enjoyed the lands owned by him by a regular chain of title, and that during that long period of time he has never set up any claim or ownership to the parcels taken and occupied by the city for the public use, but on the contrary has been content with the limits to which the occupancy of the city had restricted him. That he has sold many of the lots and portions of ground owned with reference to the boundaries and measurement of the streets taken by the city.

Held—That the plaintiff having adopted the plan of the city for the boundaries and measurement of the lots, and having acquiesced therein for a period of thirty-two years, with a full knowledge of all the facts, he is bound thereby, and from his selling lots with reference to the plan of the city his purpose to dedicate is fairly inferred.

Held further—That plaintiff can not now recover on the ground that a formal dedication is not shown.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. J. C. Walker and Semmes & Mott*, for plaintiff and appellant. *H. D. Ogden and Geo. S. Lacey*, City Attorney, for appellee.

**TALIAFERRO, J.** The plaintiff complains that the city of New Orleans, acting through its Mayor and Common Council, has in violation of his rights taken possession of and appropriated to the public use for the purpose of public streets and highways large amounts of his land, the various parcels of which, to the number of seventeen, he proceeds to designate by the names of the streets, specifying the extent of ground in each street so taken and appropriated, and alleging the value thereof to be one hundred and fifty-five thousand dollars. This suit was filed in the Sixth District Court on the eighteenth of April, 1867. Subsequently, on the thirteenth of October, 1868, the same plaintiff filed another suit against the same defendant, to recover other portions of ground alleged to have been illegally taken from him by the defendant and appropriated to public use for the purpose of streets and highways, which he proceeds in like manner to designate to the number of thirty-two parcels of ground, specifying the sections or parts of the various streets in which they lie. The value of the various lots sued for in the second suit he alleges to be two hundred and sixty thousand four hundred dollars. The two suits were consolidated and tried together in the lower court. The answer denies all and singular the allegations of the plaintiff. The defendant avers that most of the streets mentioned in the plaintiff's petition are part of the property formerly belonging to Mrs. de Pontalba and the heirs of Madame Chalou, who caused plans of the same to be made, dividing it into lots and squares, and laying out the streets mentioned in the plaintiff's petition, thereby dedicating them to public use. The defendant specially denies that the plaintiff acquired title to any part of this



land by the deed to him from Ferdinand D'Hébécourt, as alleged by plaintiff. There was judgment in the court below in favor of the defendant upon the whole claim set up by the plaintiff, except the claim in Bienville street and that in Carrollton avenue, and as to these there was judgment of nonsuit. The plaintiff has appealed.

Two bills of exceptions are found in the record, but it is not necessary in the decision of this case that we should consider them.

The controversy in this case arises chiefly from the setting up of title by the plaintiff to the land laid off into squares and lots and sold by Madame Pontalba and the heirs of Madame Chalon. He sets up this claim alleging that the land so disposed of by them makes part of the tract purchased by him from Ferdinand D'Hébécourt in 1833.

The tract bought by the plaintiff from Ferdinand D'Hébécourt on the seventh of September, 1833, by act before De Armas, notary, by plan A, is described as having twenty-three arpents, fourteen toises and three feet front on the Metairie road, and running back fourteen arpents. The side lines run at right angles to the base line and in a southwardly direction, terminating, as it seems, in a swamp. A rear line, connecting the ends of the side lines, appears and is designated "ligne nouvellement déterminée sur les lieux par l'arpenteur général," and the land adjacent to and south of this line is marked on the plan "propriété ci devant Macarty." This is the land which was laid off into squares and lots by Madame Pontalba by the plan presented by William Dunbar on the twelfth of December, 1848. The space of ground by that plan extends from the rear line of the land running fourteen arpents in depth from the Metairie road to Common street, and is the same marked on plan A as "propriété ci devant Macarty." The relative location of the land bought by plaintiff from Ferdinand D'Hébécourt and that laid off into squares and lots by Madame Pontalba by Dunbar's plan is displayed on the map D. Now, southwardly from the rear line of the D'Hébécourt tract, and at the distance, it would seem, of near a mile and a half, is the line of the Macarty plantation. The position assumed by the plaintiff, as we understand his petition, is that the sale to him by Ferdinand D'Hébécourt was a sale *per aversionem* and entitled him to all the land that would be inclosed by extending the side lines of the D'Hébécourt tract from their termination at the depth of fourteen arpents from the Metairie road to the line of the Macarty plantation, thus asserting title to the land appropriated for streets by Madame Pontalba in the plan by which her property was sold by squares and lots. As this claim of the plaintiff constitutes, with a trivial exception, the whole case, it will be necessary to trace, to a considerable extent, the titles to these two parcels of land and note the developments that may arise. We learn from the record then that the land purchased by the plaintiff

from D'Hébécourt is part of a body of land acquired by Joseph Desruisseaux in part, by grant from the French Government on the tenth of August, 1750, and partly by purchase from Joseph Girardey and Mrs. Jeanne Henry on the first of September, 1750. At the death of Joseph Desruisseaux the land passed by inheritance to his daughter Elizabeth, wife of Chalon. At her decease, her heirs sold that portion of this body of land, that the plaintiff subsequently purchased, to François D'Hébécourt by deed before Pedesclaux, notary, on the twenty fourth of July, 1820. The heirs of François D'Hébécourt sold to Ferdinand D'Hébécourt on the seventh of September, 1833, and on the same day he sold the property to the plaintiff. On the other hand, the title to the Pontalba tract commences from the concession by the French Government on the tenth of May, 1758. The land conceded is described as "the portion of vacant land between the boundary line of Desruisseaux and that of the Reverend Jesuit Fathers." The Desruisseaux acquired this land in the year 1774 by purchase from Magdelaine Brazelier. It is clear that this tract is entirely a different property from that sold to Arrowsmith, derived from a different grant and never sold or transferred as making any portion of the land purchased by Arrowsmith from Ferdinand D'Hébécourt. A claim was set up to the Pontalba tract by several claimants under a title derived from Mrs. Elenore Macarty in 1831, who purchased from Barthelemy Macarty in 1826. The land seems to have been held under this title in portions by the Canal Bank, Copeland and John Slidell.

Mrs. Pontalba, as heir of her father M. L. Almonaster, set up title to this tract through the Desruisseaux, and the heirs of Desruisseaux also claimed it. Between them and Madame Pontalba a compromise was effected, and combining, they made common cause in attacking the title set up under the Macarty's. In this contest they were successful. That suit established the location of the "ci devant Macarty property." It established clearly that Arrowsmith's title refers only to the concession by the Marquis de Vaudreuil and the purchase from the Girardey in 1750.

The plaintiff introduced in evidence several sales of property in support of his claim to the great extent he contends for. In the sale to Jason the extent from Metairie is fourteen arpents in depth. In this sale, as well as in those to Miro, Zamora and Fouvergne, the lands are described as bounded south "by Macarty." This clearly refers to the propriété ci devant Macarty, and the sale from Macarty to Macarty, it is clear, is the same property which is displayed on map D as Madame Pontalba's. The mortgage of Madame Desruisseaux, also introduced in evidence by the plaintiff, is against his pretensions. The property mortgaged is "a plantation situate on the Bayou St. John, measuring fourteen arpents front and thirty arpents in depth, bounded on one

side by the Metairie road and on the other by the lands of J. B. Macarty.

We find that the prior sales of the land Arrowsmith purchased from Ferdinand D'Hébécourt were all made with the same specification of extent, to wit: Twenty-three arpents fourteen toises and three feet front on the Metairie road, with fourteen arpents in depth. Each successive transfer of the property from that of July 24, 1820, by the heirs of Elizabeth Desruisseaux to François D'Hébécourt down to that made to plaintiff in 1833 contains the same expression of extent.

The plaintiff caused a plan of the property to be made in 1834, by which he proposed to sell lots. This plan, of which the map B is a copy, represents the land as having a depth of fourteen arpents. It is in proof that by this plan he sold a number of lots before Louis Ferrand, notary. It is further shown that in January, 1835, he deposited in the office of Cuvellier, notary, another plan made by J. N. De Pouilly, dividing the ground into squares and lots with the streets marked, and which is known as "Faubourg Jackson." This plan also retains the same description, twenty-three arpents fourteen toises and three feet front on the Metairie road by fourteen arpents of depth. The plaintiff caused the greater part of the lots displayed by this plan to be sold on the twelfth of January, 1835, by Fernandez and Whitney, auctioneers. This plan of Pouilly proved to be incorrect, in not having the base line along the Metairie road properly run. From this cause it seems the streets in their extension could not be made to conform to their original course in continuous straight lines, a condition required by the City Council as precedent to an acceptance on its part of plans for extension of the city by the laying off of building lots and the dedication of public streets. This error was afterward corrected, as shown by map or plan E, which it seems the plaintiff caused to be made in November, 1853, and deposited in the office of A. Ducatel, notary public. It is shown that this plan was made to correspond with the boundaries fixed by the judgment rendered in the suit between Madame Pontalba and the heirs of Desruisseaux, plaintiff, against Copeland and others to which we have referred. In this plan the same extent of fourteen arpents from the Metairie ridge is given, showing that to be the recognized extent of the plaintiff's land acquired from Ferdinand D'Hébécourt, and that that tract, at the extent of fourteen arpents from the ridge, joined what was known as the Copeland line or the tract called after the termination of the lawsuit by which those holding under the Macarty title lost their claims, "propriété ci devant Macarty." In his sale to Kingston the plaintiff described a lot of ground as bounded to the extent of two hundred feet by the line which separates it from Copeland's property. It is shown that the plaintiff caused to be sold at public auction by Beard & May,

auctioneers, on the twenty-fourth of November, 1853, a large number of lots according to the plan last named, made by Hadden & Sharbourn, surveyors, and deposited in the office of the notary Ducatel.

The sale by D'Hébécourt to the plaintiff is clearly not a sale *per aversionem*. It does not by specified but unmeasured boundaries indicate a certain area or extent of land without reference to quantity; but, by measured lines it indicates a specific quantity, and the purchaser gets neither more nor less than that quantity. The pretensions of the plaintiff to a greater quantity of land than is contained within the measured lines of his survey have no foundation. It is made clear that prior to the institution of this suit in 1867 he has never claimed more than fourteen arpents from the Metairie ridge. For the period of thirty-two years before instituting this suit he has been content with those limits, and to them he must be restricted. The plaintiff holds that as his plan, made by Pouilly, was rejected by the City Council, the dedication proposed by him of ground for streets and public highways never took effect through failure of the city to accept it. The plan of the "Faubourg Jackson" was by resolution of the City Council of twenty-seventh December 1834, approved, "provided the streets therein designated be in exact continuation of the streets of the city." This plan, as we understand it, was amended so as to conform to the condition expressed in the resolution, and that the lots sold in 1835 and ever since by that plan have been located in conformity with it. The plaintiff, however, contends that, as the alteration of the Pouilly plan changed the exact location of the streets as proposed by him, the portions of ground occupied by streets are not the identical portions which he intended to dedicate, and that his offer to dedicate should have been positively accepted, and in accordance with the terms in which it was made.

It is manifest from the evidence in the record that the plaintiff sold the greater part of his lots in 1835, and his acts of sale refer to the plan, and have been located according to the conditions imposed by the City Council. The purchasers have accepted the location, and the plaintiff has never objected. He has acquiesced in this respect for thirty-two years with full knowledge of the facts, and by adopting the changed location by the act of selling lots in accordance with it. We think the purpose to dedicate may in this case be fairly inferred.

We deem it unnecessary to pass on the plea of prescription made by the defendant. The judge *a quo* dismissed as of nonsuit the claim of plaintiff, based upon the widening of Bienville street and Carrollton avenue. We find no satisfactory evidence in support of this special claim, but we confirm the judgment in its entirety.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

Woolfolk v. Degelos, Durrive & Co. et al. and Hebert, Administrator, v. Woolfolk.

NO. 3781.—EMILY WOOLFOLK v. DEGELOS, DURRIVE & CO. et als. and MICHEL HEBERT, Administrator, v. EMILY WOOLFOLK.

Drafts given by a judgment debtor to her judgment creditor for various different amounts, and due at different stated times, which are accepted by the drawee, which, when paid, are to operate an extinguishment of judgments operate a full and complete extinguishment of the judgments, whenever the judgment creditor disposes of or uses the drafts for his own benefit, and in such case the judgment debtor is entitled to an injunction restraining the judgment creditor from further proceeding on the judgments.

**A** PPEAL from the Fifth Judicial District Court, parish of Iberville. *A. Posey, J. Samuel Mathews, and Race, Foster & E. T. Merrick*, for plaintiff and appellee. *A. & E. Talbot*, for defendants and appellants.

LUDELING, C. J. In these consolidated cases both parties are appellants.

The first suit is an injunction to prevent the execution of a judgment against the plaintiff, on the ground that it had been extinguished. The second suit is to revive two judgments against the plaintiff. The question at issue in both cases is, are the judgments extinguished?

In 1860, Degelos, Durrive & Co. obtained judgments against Emily Woolfolk for \$17,490, with interest and costs. In June of that year she executed nine drafts payable to her own order and indorsed by her, on Messrs. Fellows & Co., who accepted them. These drafts were given to Edward Durrive, Sr., who acted as liquidator of the firm, which had been dissolved before the rendition of the judgments.

The receipt given for said drafts is as follows:

“NEW ORLEANS, June 1, 1860.

“Received, of Emily Woolfolk, her drafts on and accepted by Messrs. Fellows & Co., all of this date, and for the following amounts, and made payable

10-13 March, 1861, for.....	\$837 66
10-13 March, 1861, for.....	837 66
10-13 March, 1861, for.....	837 66
10-13 March, 1862, for.....	837 66
10-13 March, 1862, for.....	837 66
10-13 March, 1862, for.....	1,054 08

which when paid should be in full payment of principal and interest of the two judgments in the case of Degelos, Durrive & Co. v. Emily Woolfolk, in the Sixth Judicial District Court, No. 1200, the costs remaining due by Mrs. Emily Woolfolk.

“DEGELOS, DURRIVE & CO.,

“In liquidation.”

The firm was composed of P. A. Degelos, Edward Durrive, Sr., and Thomas Mille. The evidence shows that the interest of Delegos' estate in these acceptances were transferred to the heirs of Thomas

Woolfolk v. Degelos, Durrive & Co. et al. and Hebert, Administrator, v. Woolfolk.

Mille, to equalize the partition of the assets of the partnership. Edward Durrive transferred his interest to his daughter-in-law, Mrs. Durrive, Jr., and at the partition of her estate after her death, her husband became the owner of one of the acceptances, and her mother and brothers became the owners of the others by inheritance from Mrs. Edward Durrive, Jr. The succession of Mille became the owner of four of the drafts. Subsequently Judge Labauve became owner of one of them. The others have not been accounted for in this record. It is probable that they have been paid by Fellows & Co. Suit has been instituted on four of these drafts against Emily Woolfolk by the administrator of the estate of Mille, and Judge Labauve obtained a judgment against Emily Woolfolk, as indorser, on the one he acquired.

Degelos, Durrive & Co. having appropriated and disposed of the drafts, can not be heard to say that the judgments are not extinguished.

The condition, stipulated in the contract evidenced by the receipt, that when paid the drafts shall be in full payment of the judgments, must be considered as having happened when Degelos, Durrive & Co. parted with the collaterals given for the payment of the judgments.

It is therefore ordered that the judgment of the district court reviving the judgments against Emily Woolfolk be avoided and annulled, and that the demand in that case be rejected with costs, and that the judgment perpetuating the injunction be affirmed.

It is further ordered that the defendants in the case of Emily Woolfolk v. Degelos, Durrive & Co. et als., and the plaintiffs in the suit of Michel Hebert, administrator, et al. v. Emily Woolfolk, pay the costs of this appeal.

Rehearing refused.

#### No. 3824.—B. M. BROWDER et al. v. GEORGE J. HOOK et al.

The burden falls upon the defendant when he has made the special plea of payment of establishing the fact by legal proof.

The action to compel parties to reimburse what has been paid for them on account of the purchase of lands is only prescribed by ten years.

**A**PPPEAL from the Thirteenth Judicial District Court, parish of Carroll. *Hough, J. Sparrow & Montgomery*, for plaintiffs and appellants. *M. Dubose*, for defendants and appellees.

WYLY, J. In July, 1858, Mrs. M. W. Patten and Mrs. M. V. Hook purchased jointly from W. W. Collins a small plantation in the parish of Carroll, for the price of \$12,000, represented by three promissory notes, one due and payable on the first of January, 1859, for \$6000 and the other two for \$3000 each, payable respectively on the first of January, 1860, and the first of January, 1861.

The plaintiffs have succeeded to the rights of Mrs. Patten, who died in 1862, and the defendants are the heirs of Mrs. Hook who died intestate and who transmitted by succession to them the property which she held in indivision with the said Mrs. Patten.

It appears that all the notes were paid by Mrs. Patten, at least she paid the several amounts thereof to Collins, the vendor.

This suit was instituted to compel the heirs of Mrs. Hook to reimburse the heirs of Mrs. Patten for one-half the amount of the last note maturing on the first of January, 1861, which they allege was paid alone by Mrs. Patten, one of the joint obligors.

The defendants admit the purchase of the plantation as alleged, and aver that the parties paid the first note of \$6000; that afterwards Mrs. Patten paid both the other two notes of \$3000 each before they fell due; "that afterwards, to wit, on the twenty-first of January, 1860, the defendant, Hook, paid said note of \$3000 which fell due on the first of January, 1860, to Mrs. Patten, and took up said note and now holds the same in possession with Mrs. Patten's receipt indorsed thereon. Shows that he paid and took up said note in this way, viz: Richard May, the father of said Mrs. Hook, transferred to this defendant, as tutor of his children, a certain promissory note made by John B. Williams to said Richard May for \$4330, with interest, dated the twenty-third of December, 1857, and due on the first of January, 1861, as shown by the inventory of Mrs. Patten's succession; that this defendant transferred said note to Mrs. Patten in payment of the note of \$3000 which fell due on the first of January, 1860, and for the balance, after paying the \$3000 note, Mrs. Patten gave her note which was subsequently settled. Avers that the payment of the note of \$3000 due on the first of January, 1860, to Mrs. Patten, extinguished by compensation the note sued on, and all indebtedness of his wife's succession to the succession or heirs of Mrs. Patten; that if the heirs of his wife owe the heirs of Mrs. Patten one-half of the note sued on, then he alleges that the heirs of Mrs. Patten owe the heirs of his wife one-half the note paid to Mrs. Patten by this defendant, as set forth. Defendant avers and says that the payment of \$728 99, made by him as tutor, indorsed on the note sued on, on the sixteenth of January, 1866, was made in error and under remonstrance;" that at the time the said settlement occurred, he did not have the note due on the first of January, 1860, which was mislaid and could not be found, owing to the confusion into which his papers had fallen during the war; that sometime afterwards, upon more thorough search, he found the note and now holds the same; and that as he paid the \$728 99, as a credit on the claim sued on, in error, he now claims the amount thereof in reconvention. The prescription of three, five and ten years is also pleaded in bar of plaintiffs' action.

The court rejected plaintiffs' demand and entered a judgment of nonsuit as to the reconventional demand of the defendants. The plaintiffs have appealed, and the defendants pray that the judgment be amended by allowing them the amount of their reconventional demand.

The only evidence adduced in support of the special defense set up, is the testimony of the defendant, Hook, who was examined as a witness in behalf of defendants. His evidence is unsatisfactory and is contradicted by the testimony of the witness F. M. Goodrich, who was the legal adviser and the commission merchant of Mrs. Patten and Mrs. Hook, and who was doubtless familiar with the transactions between them.

It is admitted in the answer that Mrs. Patten paid Collins, the vendor, the two notes of \$3000 each, maturing respectively on the first of January, 1860, and first of January, 1861, and indeed his receipts indorsed thereon show the fact; it is also conceded that Mrs. Patten paid the \$6000 note because Hook testifies that it was taken up shortly after it was made, and that "Mrs. Hook had nothing to do with its payment." Both parties agree that Mrs. Patten received \$3000 out of the note of J. B. Williams for \$4330, dated in 1857, and that she credited Mrs. Hook with the amount thereof. Hook says this credit was applied to the \$3000 note, maturing on the first of January, 1860, which had previously been paid by Mrs. Patten, and that the transfer of this note by Mrs. Patten was intended as a final settlement of the share due by Mrs. Hook in the note maturing on the first of January, 1861, and all indebtedness between them on account of the sums paid by Mrs. Patten on the joint purchase. He fails, however, to explain how Mrs. Hook reimbursed Mrs. Patten for the \$6000 note which she paid shortly after the joint purchase. He concedes that Mrs. Patten paid Collins \$12,000 for the land, and yet he fails to show that his wife ever contributed more than the \$3000 resulting from the transfer of the Williams note, to the reimbursement of the sums paid by her co-obligor.

On the other hand, the testimony of the witness, Goodrich, explains the whole transaction in a very satisfactory manner. He says the \$3000 resulting from the transfer of the Williams note was the contribution by Mrs. Hook for half of the \$6000 note paid by Mrs. Patten shortly after the purchase was made, and that the settlement of the twenty-first of January, 1860, in which Mrs. Patten receipted the note due first of January of that year and turned it over to Mrs. Hook as tutor, was merely the acknowledgment that Mrs. Patten had received out of their joint crops, which were shipped to the firm of Pilcher & Goodrich, of which the witness was a member, a sum equal to one-half the amount of Mrs. Hook's liability on said note, due on the first of January, 1860.



This is reasonable enough ; for why should Mrs. Patten, a lady of acknowledged wealth, call upon her co-obligor to contribute or to advance in January, 1860, her half of the note which would not mature till one year thereafter, or till the first of January, 1861.

If Mrs. Hook's half of the \$6000 note had already been contributed, why should her representative, George Hook, tutor, be called upon to pay Mrs. Patten \$3000 in January, 1860, when the latter only had the right to call for a contribution of half that amount, being, as a joint obligor, herself bound for the other half.

If Mrs. Hook had taken up and paid the note due on the first of January, 1860, her heirs might well plead it in compensation against this demand for contribution by the heirs of Mrs. Patten for payment by the latter of the note due on the first of January, 1861.

But the note sought to be used in compensation was not paid by Mrs. Hook or her heirs. It was paid by Mrs. Patten, and the moment she paid it, her part of the joint obligation became extinguished by confusion. That she subsequently receipted it and delivered it to her co-obligor, did not revive the obligation as to her, because that was already discharged by confusion. But there was a settlement between these parties on the sixteenth of January, 1866, and the defendant, Hook, in his own behalf and as tutor, recognized the obligation declared on, and caused the note to be credited \$728 99, the amount of an account which he had against the said Mrs. Patten.

He says he made this payment in error, and claims the amount thereof in revonvention, because he was doubtful at the time whether he had paid the \$3000 due on the first of January, 1860, having mislaid it; and after finding it he discovered he made the said settlement in error. Here again the witness is contradicted. Goodrich, a witness, was present at that settlement, and he says that Hook then made the same objections he now urges, and that he convinced him he was in error; also, that Hook had the note which he now says was lost or mislaid at the time of the said settlement.

As the burden of proof is with the defendants to maintain the averments of their special defense, and also to prove that the settlement of the sixteenth of January, 1866, was made in error, we think they have not succeeded in doing so; that the weight of evidence, as to these objections, is clearly with the plaintiffs; and that the proof in the record clearly entitles the plaintiffs to the judgment they pray for. The prescriptions pleaded are not applicable. Ten years have not elapsed from the payment of the debt by the co-obligor represented by the plaintiffs. Besides prescription was interrupted by the settlement and partial payment in 1866. Five years' prescription is not applicable, because the foundation of plaintiffs' action is the obligation which the law imposes on a co-obligor to reimburse the joint

obligor for the payments made by him. The prescription of such an obligation is ten years.

It is admitted that the mortgage securing the obligation of Mrs. Hook has been duly reinscribed.

For the reasons stated it is ordered that the judgment appealed from be annulled, and it is now ordered that the plaintiffs recover of the defendants fifteen hundred dollars, with eight per cent. per annum interest, from the first of January, 1861, subject to a credit of seven hundred and twenty-eight dollars and ninety-nine cents, on sixteenth of January, 1868.

It is further ordered that the mortgage be recognized and rendered executory on the property described therein and also the vendor's privilege, and that the same be sold according to law for payment of this judgment.

It is further ordered that the defendants pay costs of both courts.

Rehearing refused.

No. 3807.—CLARA H. FLOWER v. M. LEGRAS, Tax Collector, Parish of Rapides.

Article 118 of the Constitution which makes it obligatory on the general assembly to levy a poll tax for school purposes, does not prohibit the assessment of a tax on property for the same purpose. An additional tax on property for the support of public education is not therefore unconstitutional.

The Revenue Act which authorizes the Auditor to communicate to the tax collectors the amount necessary to be collected for interest purposes, does not impose upon the Auditor the duty, or confer upon him the power of levying a tax. It merely designates him as the officer to ascertain the amount of interest tax to be collected, and is not therefore in violation of the Constitution which lodges the taxing power exclusively in the legislature. A taxpayer has no right to complain if the amount of taxes demanded of him is shown to be less than the amount he owes.

**A**PPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. Robt. P. Hunter, District Attorney pro tem., for tax collector, appellee. Ryan, Bowman, Seay & Manning, for defendant and appellant.*

**LUDELING C. J.** The plaintiff obtained an injunction to restrain the defendant from selling her property to pay taxes, on the grounds following:

*First*—That the four mills on the dollar as State tax is excessive and illegal—that the State tax is only two and a half mills on the dollar, they contend that because the act No. 96, of the General Assembly of 1870, approved the fourteenth of March, 1870, provides that it shall go into effect on the first of April following, it therefore repealed the law passed on the sixteenth of March, at the extra session in 1870, which provided a revenue for the State. This does not merit serious consideration.

*Second*—That the tax of two mills on the dollar as school tax, is unconstitutional, inasmuch as the Constitution has provided that a capitation tax shall be levied for school purposes. It is difficult to conceive how article 118 of the Constitution can be construed to imply a prohibition on the legislature to levy a tax on property for school purposes. It makes it obligatory on the General Assembly to levy a poll tax, which in part shall go to support the public schools; but it does not in the remotest way prohibit the assessment of another tax on property for the same purpose. Article 135, on the contrary, expressly declares that the legislature shall provide for the support of public schools by taxation or otherwise. We are unable to discover wherein the tax is unconstitutional.

*Third*—The "interest tax" is next resisted because it is imposed by the Auditor, and the legislature can not delegate its authority to tax. The error is in supposing that the legislature delegated its power to tax to the Auditor, or that he levied the tax. He is merely the arithmetician designated by the law to ascertain how much *interest* on the State debt is to be provided for, and to inform the collectors of that fact.

But the plaintiff contends that the collector is attempting to collect five and a half mills as "interest tax," whereas the Auditor and the law only require four and a half mills. The plaintiff admits, however (and it is proved by other evidence), that the tax collector was not demanding more money of her than she owed for her taxes. It would seem to be of little importance, whether or not the memorandum of the taxes due by the plaintiff showed that the collector had embraced in the "interest tax" an amount which should have been placed under "levee tax." So long as no more is demanded of the taxpayer than the amount he owes he can not be injured.

*Fourth*—The parish taxes seem to have been legally assessed, and the evidence in the record shows that the formalities of law were duly observed, by the collector, in proceeding to collect the taxes.

The act of 1871, section fifty-eight, directs that "upon a dissolution of any injunction hereafter granted to injoin or delay the collection of any such taxes," etc., "the court ordering such injunction to be dissolved shall enter a decree against the person or persons suing out the same, and his or their securities on their injunction bond, for the sum of twenty per cent. on the amount of all taxes, the collection of which was delayed or enjoined, and all costs of suit." 120.

It is therefore ordered and adjudged that the judgment of the lower court be amended so as to allow twenty per centum on the amount of the taxes as damages, against the plaintiff and her security on the injunction bond *in solido*, and that as thus amended the judgment be affirmed with costs of appeal.

## No. 3716.—JOSEPHINE MAYER et al. v. L. B. DAYRIES et al.

The parish court is without jurisdiction *ratione materie* to grant an injunction to stay the sale of property where a succession is defendant in the suit, and the amount involved is above five hundred dollars.

**A**PPEAL from the Parish Court, parish of West Feliciana. *H. S. Welton*, Parish Judge. *A. Trudeau* and *Thomas Butler*, for plaintiffs and appellants. *Samuel J. Powell*, for defendants and appellees.

**LUDELING**, C. J. After the plaintiffs had obtained an order of seizure and sale against certain property belonging to the succession of Caleb Chinn, and had seized and advertized it for sale, the administrator of the said succession obtained an order to sell the steam engine and machinery attached to the plantation which had been previously seized under the order of seizure and sale.

The plaintiffs thereupon obtained an injunction from the parish court to stop the proceedings under the order obtained by the administrator. In their petition for the injunction, the plaintiffs allege that the engine and machinery is worth over five hundred dollars.

The parish judge dissolved the injunction on the ground that the matter in dispute exceeded five hundred dollars, and the court was without jurisdiction *ratione materie*. The ruling was correct. The matter in dispute, the engine and machinery, exceeds in value five hundred dollars, and a succession is defendant in the suit. Constitution, art. 87; 21 An. 455, 478, 610, 616; 22 An. 81, 517, 593.

The question is not whether or not the parish judge can annul an illegal order made by him, but whether the parish court can issue an injunction and try the rights of the parties to that injunction suit, when the matter in dispute exceeds five hundred dollars, and a succession is a party defendant to the suit? We think not.

The question involved in the injunction suit is, whether or not the engine and machinery which, it is alleged, is immovable by destination by being attached to the plantation for its use, is affected by the mortgage of the plaintiffs on the plantation, and consequently by the seizure of the plantation under the executory process? The plaintiffs hold the affirmative of this proposition, while the succession disputes it.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed, with costs of appeal.

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**WYLY**, J., *dissenting*. The plaintiffs had judgment in the district court against the succession of Caleb Chinn, for a large amount, recognizing and rendering executory their mortgage on the property described in the act of mortgage. While the property was under seizure

to satisfy said judgment and mortgage by virtue of a writ from the district court, the administratrix of the succession of Caleb Chinn obtained from the parish court an order to sell a certain steam engine and fixtures on the mortgage premises, being part of the property then under seizure. In order to arrest this interference and conflict of authority, the plaintiffs applied to the parish court to revoke the order interfering with the prior seizure under the process of the district court, and also for the conservatory remedy of injunction to stay proceedings in the meantime.

The parish court granted the writ; but when the case came to be heard, dissolved the injunction and dismissed the demand of the plaintiffs with one hundred dollars damages, on the ground that the court was without jurisdiction *ratione materiae*, the value of the engine and fixtures exceeding five hundred dollars. From this judgment the plaintiffs appeal.

The matter in dispute is not the engine and fixtures; no one sets up adverse claim to it; both parties agree that it belongs to the succession, and ought to be sold to pay debts. The contest is simply as to the manner of sale. Shall the property be sold at probate sale, or shall it be sold with the mortgaged premises to which it is attached, under the judgment of the district court, recognizing the mortgage bearing on it in favor of the plaintiffs? Both forms of sale are legal; but the question was whether the order of the parish court was not improvident at the time, inasmuch as the property was already under seizure by the writ of a competent court, to satisfy the claim of acknowledged and recognized mortgage creditors.

Now, whether the engine and fixtures are worth five hundred dollars or five thousand dollars, is of no consequence. It being succession property and at the same time mortgaged property, either court had jurisdiction to order the sale.

Now if the parish court had authority to order the sale, as it undoubtedly had, it certainly had authority to reconsider and to revoke that order. It likewise had authority to suspend the execution of the order by injunction, pending the examination and trial of the question. It would be absurd to say that the court has jurisdiction to sell the property because it belongs to the estate of Chinn, but it has not jurisdiction to suspend the execution of the order by injunction till it can hear an application to revoke the order. If it can grant the order and if it can revoke the order, it certainly can suspend its execution by the mandate of injunction till any question in relation thereto shall have been considered and determined by the court. The plaintiffs, therefore, did not err in applying to the parish court to revoke the order on the grounds stated in the petition, and in the meantime to restrain its execution till the parties could be heard.

Josephine Meyer et al. v. Dayries et al.

The district court had no authority to revoke the order of the probate court, requiring and commanding the sale of succession property. And the only court competent to grant the relief sought by the plaintiffs is the one to which they applied in this case.

For the reasons stated I dissent in this case.

I concur in the opinion of Mr. Justice Wyly.

R. K. HOWELL.

Rehearing refused.

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No. 2664.—PIKE, LAPEYRE & BROTHER v. J. M. WELLS—E. L. JEWELL, Garnishee.

A claim for damages that is unliquidated, can not be pleaded against a liquidated and established debt.

**A** PPEAL from the Sixth Judicial District Court, parish of Jefferson. *Pardee, J. Hays & New*, for plaintiffs and appellees. *Wooldridge & Thomas*, for garnishee and appellant.

HOWE, J. Under a judgment against defendant a seizure was made in the hands of Jewell. The latter admitted he owed the judgment debtor \$1000, but averred that he had a claim against Wells for damages, and he believed suit had been instituted thereon, and upon the issue of this suit would depend the question whether he was indebted to Wells.

Upon this answer judgment was given against Jewell for \$1000, and he has appealed.

The debt of Jewell to Wells was a liquidated one, and could not be compensated by an unliquidated demand for damages.

Judgment affirmed.

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No. 3739.—B. M. NUZUM v. ELIJAH GORE.

A reconventional demand for damages for the wrongful suing out of a sequestration, can not be set up by the defendant where the parties reside in the same parish. Nor does the law authorize the imposition of such damages in any case on the setting aside of a sequestration.

**A** PPEAL from the Seventh Judicial District Court, parish of West Feliciana. *Miller, J. Collins & Leake*, for plaintiff and appellant. *Samuel J. Powell*, for defendant and appellee.

HOWE, J. A sequestration was issued in this case to enforce a vendor's privilege, claimed by the plaintiff on sundry cypress logs. The defendant filed an exception that the suit was premature, the amount agreed to be paid not being due.

A mass of testimony was taken on this question, and it seems to have been very carefully considered by the district judge. He saw

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and heard the witnesses, and after an elaborate discussion of the facts he arrived at the conclusion that under the agreement of the parties the debt claimed by plaintiff was not yet due, and he therefore sustained the exception and dismissed the suit, with one hundred dollars damages.

We do not feel authorized to disturb this finding of the judge upon the question of prematurity, but we think there was error in giving judgment for damages. The parties reside in the same parish, and such a claim can not be set up in reconvention. Nor is there any statute authorizing such an imposition of damages, as in the dissolution of an injunction. *Knox v. Thompson*, 12 An. 116; *Morgan v. Driggs*, 17 La. 176.

Let the judgment be amended by striking therefrom the amount awarded as damages, and as thus amended let it be affirmed.

No. 3762.—*JOSHUA C. THOMAS v. L. J. KENNEDY & B. W. SEWELL.*

In a suit to annul and cancel a retransfer of real estate, on the ground that a retransfer was procured through the fraudulent representations of the vendor, parol evidence is admissible to prove the fraud.

The testimony of a defendant who has given evidence at the request of the plaintiff, may be contradicted or overcome by other testimony, the same as that of any other witness.

**A**PPEAL from the Fifth Judicial District Court, parish of East Feliciana. *Posey, J. McVea & Kilbourne*, for plaintiff and appellee. *Kernan & Lyons*, for defendants and appellants.

This case was tried by a jury in the court below.

WYLY, J. The plaintiff alleges that in January, 1868, he purchased from Mr. L. J. Kennedy the four hundred and fifty-five acres of land described in the petition for \$3500, evidenced by his four promissory notes, to wit: one for \$500, payable on demand, and the other three for \$1000, each payable respectively, first June, 1868, first June, 1869, and first June 1870; that he agreed to pay said amounts to Bennett W. Sewell, who held a conventional mortgage for like amounts on the six hundred and fifty acres owned by his vendor, Mrs. Kennedy, of which the four hundred and fifty-five acres purchased by him formed part; that in November, 1868, he delivered to said Sewell five bales of cotton, the proceeds to be applied as a credit on said notes; that in January, 1869, Mrs. Kennedy and Sewell proposed to him, that if he would retransfer to Mrs. Kennedy the four hundred and fifty-five acres, that she would convey it, together with one hundred and ninety-five acres besides on which Sewell's mortgage bore, to Sewell in payment of said mortgage and that Sewell would then transfer the whole six hundred and fifty acres to the petitioner for \$5200; that relying on their good faith, he made the transfer in compliance with said agree-

ment on twenty-third January, 1869, to Mrs. Kennedy; that after obtaining the said retransfer the said parties refused to comply with their verbal agreement; that instead of carrying it out in good faith, Mrs. Kennedy conveyed only four hundred and ninety acres to Sewell in payment of his mortgage, reserving the balance of the six hundred and fifty acres to herself; that he was induced to make the said retransfer to Mrs. Kennedy by the fraudulent representations of herself and Bennett W. Sewell, and that they obtained it by their fraudulent conspiracy against him.

The prayer of the petitioner is that the said retransfer of the four hundred and fifty-five acres to Mrs. Kennedy be avoided and annulled; that the transfer from Mrs. Kennedy to Sewell, in September, 1869, be also annulled so far as the same affects the petitioner and the four hundred and fifty-five acres of land; and that the said Mrs. Kennedy and Sewell and the petitioner, be each decreed to be in the same position as if the said retransfer of the four hundred and fifty-five acres of land by him to Mrs. Kennedy and the sale thereof by her to Sewell had not been made.

The defendants pleaded the general issue, and set up reconventional demands for rent of the land and for damages.

The case was tried by a jury, and on their verdict the court gave judgment for the plaintiff. The defendants have appealed.

The defendants excepted to the ruling of the court in admitting parol evidence to establish the allegations of the plaintiff, on the ground "that a sale or the agreement for the sale of immovables can not be proved by parol." There is no force in the bill of exceptions. The suit is not to enforce the verbal agreement for the several transfers of the property in question; it is simply an action to annul the retransfer obtained by the defendants from the plaintiff, on the ground of the fraud and collusion practiced by them in getting it.

If the plaintiff parted with his property on the fraudulent representations of the defendants, as he alleges, it is certainly competent that parol evidence shall be received to prove it.

The evidence in the record sustains the verdict of the jury, and we see no reason to reverse the judgment of the court thereon.

As to the objection that because the defendants were examined as witnesses by the plaintiff, their answers can not be contradicted by other evidence in his behalf, we will remark there is no force in it. Under the law allowing parties having pecuniary interest to testify, their testimony can be contradicted by the opposite party the same as that of any other witness called in the case. The other objections are also without force.

Judgment affirmed.

Rehearing refused.



## No. 3752.—HENRY WADE et als. v. L. CASPARI.

A judgment in favor of a tutor of minors is prescribed by the lapse of ten years from its rendition, if it has not been revived in the manner pointed out by law. Session Acts of 1853, page 250. 23 An. 587.

**A**PPEAL from the Ninth Judicial District Court, parish of Natchitoches. *Orsborn, J. C. Chapman & Son*, for plaintiffs and appellees. *J. M. B. Tucker*, for defendant and appellant.

WYLY, J. On the second September, 1854, Lewis R. Wamsly, tutor of the plaintiffs, who were then minors, recovered judgment against their former tutrix and co-tutor for \$1441 75, being the balance found to be due on the rendition of their final account.

The plaintiffs, who are now of age, have brought this hypothecary action against the defendant, who acquired the property described in the petition, subsequent to the rendition of said judgment, from said tutrix and co-tutor.

The main defense is, that the judgment upon which this hypothecary action is based, is prescribed, more than ten years having elapsed and no revival thereof attempted.

The court gave judgment for the plaintiffs and the defendant appeals.

We find the judgment sought to be enforced against the property of the defendant by this hypothecary action, has never been revived and seventeen years have elapsed since it was rendered. We think the court erred in not maintaining the plea of prescription. The language of the act of 1853, is very sweeping; it makes no exceptions. It says: "All judgments for money, whether rendered within or without the State, shall be prescribed by the lapse of ten years from the rendition of such judgment; provided, however, that any party interested in any judgment may have the same revived at any time before it is prescribed by having a citation issued according to law." \* \* \* Acts 1853, page 250. In *Byrne, Vance & Co. v. Garrett*, executor, 23 An. 587, this court said: "The act of 1853, fixing the prescription of judgments at ten years from their rendition, also provides the only means by which it can be averted." In the case of *Arrowsmith*, 21 An. 295, this court said: "The statute before us is in itself free from ambiguity. It says plainly that all judgments for money shall be prescribed by the lapse of ten years from the rendition thereof unless they are revived before they are prescribed by having citation issued from the court which rendered them."

But the plaintiffs contend that as they were minors, they are excepted from prescription under art. 3488 C. C. It is true the Code, which is the statute of 1825, excepts minors from prescription; but the statute of 1853 does not; it makes no exception. Now because

minors are excepted from the operations of the prescriptions announced in the Code or statute of 1825, does it follow that they are also excepted from the operation of the law of 1853, when that law makes no exception whatever, but on the contrary declares, in precise terms, that "all judgments for money shall be prescribed in ten years from their rendition" unless revived in the manner therein provided? If judgments in favor of the tutor of minors are not prescribed in ten years, as the plaintiffs insist, then all judgments are not prescribed, but only some. The law of 1853 which has been decided, 21 An. 295, to be free from ambiguity, will be disregarded under pretext of pursuing its spirit, in contravention of art. 13 C. C. The law of 1853 being free from ambiguity, there is no room for construction; it means what it says. When it says: all judgments, whether rendered within or without the State shall be prescribed in ten years, we understand that it means every judgment for money. If the exception in favor of minors in the Code of 1825 were applied to this statute, its meaning would be altered; all judgments would not be prescribed in ten years, but only some; judgments in favor of tutors would not be, although the statute creating the prescription, makes no exception.

Why should not tutors execute the judgments which they hold against debtors of the minors within ten years? It is their duty to do so; and if they fail in their duty the minors have the legal mortgage to secure them against the losses resulting therefrom. Courts favor laws of prescription because it is the interest of the Republic that litigation should terminate, that there shall be no suits, when parties fail to prosecute their rights within the reasonable period fixed by law for them to do so.

The statute before us makes no exception, and where the law has not discriminated, we can not.

Let the judgment appealed from be annulled, and let the demand of the plaintiffs be rejected, with costs of both courts.

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HOWELL, J., *dissenting*. This is the first time the question, whether or not the prescription of judgments, established by the act of 1853, runs against minors, has been presented to this court, and I am unable to say that it does. It must be borne in mind that the judgment under consideration is simply one homologating a tutor's account and decreeing the sums due the minors respectively. It is true the said act is general, and by its terms applies to all judgments for money; but it must be construed or applied in connection with all other laws on the subject of prescription, and art. 3488 of the Civil Code (3522 of the revised Code) declares that "Minors and persons under interdiction can not be prescribed against except in the cases provided by

law." This rule is reiterated in art. 3519 C. C., with a slight modification of the last clause, which is appropriate in its position, following the express exceptions. As the act of 1853 does not provide expressly that the prescription it establishes shall run against minors, it should not be so applied. This act and the art. 3488 are not irreconcilable. All laws upon the same subject should be construed, if possible, to give force to each. This can be done in this instance by holding, and not without reason, that the Legislature intended the act of 1853 to be applied, as other equally positive and general provisions of law on the subject of prescription, that is, not to apply to minors, because of the existing special provision that no prescription is to apply to them unless the law in express terms declares that it shall. The Legislature is presumed to enact laws with reference to existing legislation on each subject, and the interpretation given to such legislation. The laws on the subject of prescription against minors in this respect, had received frequent interpretation prior to the act of 1853. 12 R. 264; 6 An. 111. If it was intended that said act should apply to minors the Legislature would doubtless have so expressed it. If judgments, homologating tutor's accounts and *fixing the amounts* due minors are prescribed by ten years, a grave and remarkable change is wrought in the legislation and jurisprudence relating to their rights. The law requires the rendition of annual accounts and the judgments homologating them, heretofore considered not conclusive, will place the minors in a much worse condition than if accounts are not filed and homologated.

I can not think the statute establishing the prescription of judgments is to be so understood.

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No. 3982.—ETIENNE VILLAVAS v. A. W. WALKER.

The wrongful suing out of an injunction to stay the execution of a judgment of the Supreme Court on alleged grounds that have arisen subsequent to the decision will not be regarded as a contempt of the authority of the Supreme Court.

ON rule for contempt. *O. Rossius* and *Alfred Philips*, for relator.  
A. W. Walker, in person, respondent.

LUDELING, C. J. The plaintiff alleges that P. Jorda, parish judge of the Parish of St. Bernard, acting as District Judge of the Second Judicial District, has, in violation and contempt of the peremptory mandamus issued by this court, granted another injunction (being the fifth) to prevent the execution of the judgment of this court rendered in the above entitled cause, at the instance of the defendant A. W. Walker, and that the conduct of the said judge and A. W. Walker evince a determination to put the authority of this court at defiance and to treat it with contempt.

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Etienne Villavas v. Walker.

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The judge *a quo* is not shown to have known what proceedings had been taken in this case, and he disclaims any intention to disobey or disregard the mandates of this court. A. W. Walker also disclaims any intention to disobey and disregard the orders of this court, and he insists that what he has done has been solely to protect his legal rights.

The grounds upon which he bases his application for an injunction do not seem to be sufficient to justify the writ, but we are not prepared to say that the wrongful suing out of an injunction on alleged grounds, arising since the judgment, can be properly construed to be in contempt of the authority of this court. For the wrongful suing out of the injunction, the law furnishes a remedy by authorizing the judge to mulct the party and his surety in damages.

While we will scrupulously maintain the authority of this court and exact obedience to its mandates, we will not exercise the power in a doubtful case to punish for a contempt.

It is better that ninety-nine guilty shall escape punishment than that one person shall be deterred by this court from the exercise of a legal right. It is therefore ordered that the rule be dismissed.

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No. 3198.—J. R. BOWIE v. H. R. LOTT.

Article 132 of the constitution, which provides that "all lands sold in pursuance of decrees of courts shall be divided into tracts of from ten to fifty acres," is not self-acting, and can only have effect in the manner and to the extent provided for by statute.

**A**PPEAL from the Parish Court of Carroll. *Hough, J. M. Dubose*, for plaintiff and appellant. *Sparrow & Montgomery*, for defendant and appellee.

HOWE, J. The succession of Mrs. Nancy Bowie was opened in the Parish of Carroll in 1867. In August, 1869, a tract of land belonging thereto was ordered to be sold to pay debts, and was purchased by H. R. Lott. The purchaser sued out a monition for the purpose of curing irregularities, and to this an opposition was made by J. R. Bowie, claiming to be universal heir of the deceased.

There was judgment in favor of the purchaser and the opponent has appealed.

There are several points made by appellant which do not appear to have any especial force. The purchase was made in good faith, presumably, and the court had jurisdiction to order the sale. The purchaser is therefore protected by the decree against irregularities and informalities, if any there were, prior to such decree. We do not perceive any irregularities subsequent to the order of sale, unless they are to be found in the fact that the lands were not divided for purposes

of sale into tracts of from ten to fifty acres, in accordance with the provisions of the Constitution of 1868. The opponent makes this point also, and we are required to pass upon it.

The constitutional provision in question reads as follows :

"Article 132. All lands sold in pursuance of decrees of courts shall be divided into tracts of from ten to fifty acres."

By act No. 40, approved February 24, 1869, provision is made for carrying into effect this article, so far only as contracts made and successions opened after the date of the adoption of the Constitution of 1868 are concerned. The theory of the legislator seems to have been that the constitutional provision was not intended to be self-acting ; that it required a statute to supply the necessary machinery for its practical operation ; and that it would not be just to supply this machinery, except so far as contracts made and successions opened after the adoption of the constitution were concerned.

There is much to lead us to suppose that this article was not intended to be self-acting. It appears at first glance that it is not prohibitory in its terms, and is not therefore within that class which for their execution require only that the citizen, whether in his official or his individual capacity, should refrain from disobedience of their provisions. *State ex rel. Salomon & Simpson v. Graham*, 23 An. 204. Again, there is no penalty or nullity announced in the article, and it might be matter of serious discussion whether, in the absence of any sanction, it was intended by the framers of the constitution that the article itself should, *proprio vigore*, invalidate every sale of lands made after its adoption, which should not accord with its regime, although the legislature should not have provided any practical means for carrying out the design of the article. And this suggests finally another reason which is perhaps still more cogent, namely, that the article in question furnishes no *modus operandi* by which the sales are to be made, but, rather contains a general direction addressed to the legislative department, announcing a new policy in regard to the division of land, and leaving to the legislature the task of carrying the idea into practical execution. How is the land to be divided ? Who is to make the division ? How are the possibly large expenses of accurate surveys to be paid ? What was intended to be done under the necessary numerous orders of sale requiring to be executed between the date of the adoption of the constitution and the date when the legislature, acting with the utmost diligence, might devise the necessary machinery ? Upon these important points the article is silent, and prior to the act of 1869 the statute book was silent also.

We must conclude that the article in question was not self-acting in the manner claimed by opponent ; that it could be carried into practical operation only by a statute ; and that, therefore, it had no effect in

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this case, because the succession was opened prior to the adoption of the Constitution of 1868, and a sale of its lands was not only not provided for by the statute, but expressly excluded from its operation.

Whether the Legislature did its full duty in providing for a sale of certain property, and excluding another class is a matter for the conscience of the legislator. It is enough for the courts to see that the article is not self-acting, and can therefore take effect only to the extent provided for by the statute.

Judgment affirmed.

Rehearing refused.

No. 3719.—MOORE & SIMMONS v. WILLIAM POLK.

The admission by the defendant in the answer, that the plaintiff acquired the notes sued upon, by the indorsement in blank of the payee, is sufficient proof of the signature of the indorser.

**A**PPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. R. A. Hunter*, for plaintiff and appellee. *T. C. Manning*, for defendant and appellant.

HOWE, J. This is an action on notes made by defendants to the order of Cummings, Brown & Co., and alleged to have been indorsed by the latter to plaintiffs. The answer was a general denial, followed by this admission and averment:

"For further answer the defendant admits his signature to the notes, but he denies that the plaintiffs are the owners of them, and alleges that these notes were received by the plaintiffs herein as the agent and attorney in fact of the payees." etc. \* \* \* \* \*

He then averred that the notes belonged to the assignee in bankruptcy of Cummings, Brown & Co., and not to the plaintiffs. On the trial defendant objected to the notes being received in evidence, because the indorsement in blank of Cummings, Brown & Co. was not proved. The objection was overruled and defendant reserved a bill of exceptions.

It is quite true that in a suit against the maker of a note to order, the indorsee must prove indorsement by the payee if denied; but in this case the statement by defendant in his answer seems to be sufficient evidence. It is an admission that the plaintiffs received the notes in suit by transfer from Cummings, Brown & Co. the payees, and implies that the name of the payees written in blank on the back of each is a genuine signature. No defense is pretended to exist as against these payees, of which the suit by plaintiffs may deprive the defendant. No proof was offered of any defense whatever to the notes.

Judgment affirmed

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Southern Dry Dock Co. v. Bayou Sara Packet Co., Goddin, McCan and Rusha.

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No. 2379—SOUTHERN DRY DOCK COMPANY v. BAYOU SARA PACKET COMPANY, A. C. GODDIN, D. C. MCCAN and E. M. RUSHA.

The sale of his property by a debtor in insolvent circumstances, may be annulled on the ground of fraud; and in such a case fraud will be presumed if the vendee had knowledge of the insolvent condition of the vendor at the time of the sale. C. C. 1984.

**A**PPEAL from the Seventh District Court, parish of Orleans. *Collens, J. B. Egan*, for plaintiff and appellee. *Thomas Hunter* and *R. H. Marr*, for defendants and appellants.

LUDELING, C. J. The plaintiff sued the Bayou Sara Packet Company for nineteen hundred and eighty dollars, with legal interest from fourteenth May, 1867, and also the defendants, Goddin, McCan and Rusha, to revoke (so far as it affects petitioner's rights) the transfer of the steamer Wagoner, made by the said Bayou Sara Packet Company to said Goddin, McCan and Rusha, fraudulently and to the injury of petitioner's rights.

There was judgment in favor of the plaintiff and the defendants have appealed.

The evidence satisfies us that the Bayou Sara Packet Company was in insolvent circumstances, when it made the transfer of the said boat to Goddin, McCan and Rusha, and that they knew this. Goddin was president of the company, and McCan and Rusha were members thereof. The price was the assumption of certain debts of the company, a very large proportion of which were due to themselves. There is no evidence to show that any portion of the price, if paid, inured to the benefit of the plaintiff.

"The property of the debtor is the common pledge of his creditors." C. C. 3183. A right implied in all obligations is "that the property of the debtor shall be liable for all the consequences attending non-performance." C. C. 1968. Therefore, "it results that every act done, by a creditor, with the intent of depriving his creditor of any eventual right he has upon the property of such debtor, is illegal, and ought, as respects such creditor, to be avoided." 1969 C. C.

"If the party with whom the debtor contracted be in fraud as well as the debtor, he shall not, on the annulling the contract, be entitled to a restitution of the price or consideration he may have paid, except for so much as he shall prove has inured to the benefit of the creditors by adding to the amount of property applicable to the payment of their debts; but if the only consideration be a sum due from such debtor to the party with whom he contracted, then the only restitution to be made is the placing the parties in the situation in which they were before the contract complained of was made." C. C. 1982.

And "every contract" the Code says, "shall be deemed to have been made in fraud of creditors, when the obligee knew that the

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Southern Dry Dock Co. v. Bayou Sara Packet Co., Goddin, McCan and Busha.

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obligor was in insolvent circumstances, and when such contract gives to the obligee, if he be a creditor, any advantage over other creditors of the obligor." 1984 C. C.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed, with costs of appeal.

Rehearing refused.

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No. 3615.—SUCCESSION OF ALEXANDER NORTON—On opposition of JOHN OSBORN, Tutor.

A commission merchant, who has received a lot of cotton on consignment from the tutor as the property of the minor, can not appropriate the proceeds thereof to the payment of a debt or obligation due him by the tutor. In such a case the proceeds of the sale of the cotton or its value, as shown at the time it was received, belonging to a minor may be recovered from the merchant, less the expenses incurred in shipping and selling it, even though the merchant show that the cotton was shipped in the individual name of the tutor, and that the tutor was indebted to him, on his own account, in an amount above the proceeds of the sale of the cotton.

**A** PPEAL from the Second District Court, parish of Orleans. *Dwig-neaud, J. W. B. Hyman*, for appellant. *Miles Taylor and James Brewer*, for appellees.

LUDELING, C. J. The opponent claims that the succession is indebted to him as tutor in the sum of \$12,062 50, with five per cent. interest per annum from fifth of April, 1867, being the value of thirty-five bales of cotton alleged to have been shipped to him by said tutor as the property of the minor. The answer is that Norton had no knowledge of the fact that the property belonged to the minor; that he had agreed to furnish supplies and money to carry on a plantation cultivated in cotton by the said John Osborn, and that the cotton made should be shipped to him as a commission merchant; that he did make large advances to said Osborn; that he received thirty-five bales of cotton shipped to him in the name of John Osborn and marked J. O.; that he sold this cotton and accounted for it to Osborn; that he rendered an account to Osborn in January, 1868, long after he had received and sold the cotton, which showed that Osborn owed him a balance of \$2025 13 after crediting him with the proceeds of the cotton.

The evidence on the record shows that the cotton shipped belonged to the minor J. H. Osborn, and that the deceased, Norton, was informed of the fact. Osborn swears that Norton knew this cotton belonged to the minor, as he had consented to go on a sequestration bond to get possession of it for the minor; and Fluke, a merchant, testified that he was present in Norton's office in the latter part of April or in May, 1867, when Osborn asked him if he had sold his child's cotton, and Norton replied that he had not yet, but that he would as soon as possible. Osborn further testifies that he often afterward called on



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Succession of Norton.

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Norton to account for the same, but he never did. It is further proved that the Osborn plantation failed to make any cotton in 1866.

Having received the cotton from the tutor as the property of the minor, the merchant could not appropriate the proceeds thereof to the payment of the obligations due to them by the tutor without his consent. To do so would be a breach of confidence and violation of good faith.

It appears, however, that after the shipments of the cotton Osborn drew the following amounts from Norton, to wit: \$300, \$200, \$60. This amount, \$560, should be deducted from the proceeds of the sale of the cotton.

The defendant alleges that he did not sell the cotton until January, 1868, and he does not explain why he kept the cotton so long before selling it. As has already been observed, the tutor Osborn called on him in the latter part of April, or in May, 1867, to inquire if he had sold the cotton, and Mr. Norton promised to sell it as soon as possible. It is manifest, therefore, that Osborn wanted him to sell as soon as possible after the shipment of the cotton, which was early in April, 1867, and no satisfactory reason is given for failing to do so. Nor is it proved that the cotton shipped was not sold until January, 1868—the proof is that some cotton marked J. O., which was damaged, was sold in January, 1868. That does not by any means prove that it was the cotton shipped by Osborn in April, 1867. Nor do the bills of lading prove conclusively that the cotton was damaged. One bill states that fifteen bales were shipped “in good order and condition,” and that they are to be delivered in the like good order and condition. At the bottom of the bill is added “damaged, bad order, and not accountable for weights.” The other bill has added at the bottom thereof “condition and damage excepted.” These exceptions were not intended to prove that the cotton shipped was damaged, but only that the carrier was not willing to be held responsible for its condition. Fluke, who saw the cotton before it was shipped, says he wanted to buy it—that he thinks it was worth forty cents per pound. It was not damaged, if his statement be true, and there is nothing to contradict it, unless the evidence contained on the bills of lading contradict him. If the cotton was damaged it was the duty of the merchant to have sold it as soon as possible, as it must have deteriorated in value every day; and he should have notified the shipper that it was damaged.

The evidence of several witnesses shows that the cotton was worth thirty-five cents per pound during the spring of 1867, and that the thirty-five bales weighed between four hundred and fifty and five hundred pounds per bale. Adopting the lowest estimate of the weights at thirty-five cents per pound, the proceeds of the cotton would equal

\$5512 50. The freights, charges and internal revenue tax and sums advanced to Osborn on the cotton mentioned above, will equal \$1087 50, which must be deducted from the gross proceeds of the cotton.

It is therefore ordered and adjudged that the judgment of the lower court dismissing the opposition of J. Osborn, tutor, be avoided and that there be judgment in his favor against the estate of Alexander Norton, for the sum of four thousand four hundred and twenty-five dollars, with legal interest from judicial demand, costs to be paid in due course of administration, and that in all other respects the judgment of the lower court be affirmed, the costs of this appeal to be paid by the succession.

NO. 2614.—J. L. LEVY & SALOMON v. BANK OF AMERICA.

A bank is not required to know any of the persons who indorse a check drawn upon it, except the one who presents it for payment, nor is it authorized to withhold payment until it is furnished with direct proof that the signatures of the indorsers preceding the one presenting it are genuine. In cases of this kind the rule is that the bank must know that the signatures of the drawer and the person who presents it for payment are genuine, under penalty of liability to pay it again in case either of the signatures are shown to be a forgery. But if it be shown that the signatures of the indorsers which precede that of the one receiving payment is a forgery, the bank can not on that account be held to a second payment.

**A** PPEAL from the Seventh District Court, parish of Orleans. *Collens, J. Hyams & Jonas*, for plaintiffs and appellants. *Johnson & Denis*, for defendant and appellee.

HOWELL, J. The plaintiffs, who are brokers and dealers in State warrants, etc., purchased of a man unknown to them a State warrant for nine hundred dollars, drawn to the order of and indorsed by Charles H. Merritt, the secretary of the State Senate, for which they gave their check for seven hundred and twenty dollars on the bank of America, (where they kept a deposit account) drawn first to bearer, but changed by them before delivery to the order of said Merritt. This change was made after the stranger was asked if he was Charles H. Merritt and replied affirmatively, the object being, as stated, to make him identify himself to the bank. This check, bearing the name of Charles H. Merritt on its back, was taken by Isidore Newman, a broker, keeping an account also with the defendant, in exchange for coin and currency and by him deposited with his indorsement on it with the bank of America, its amount being credited to him and charged to the plaintiffs. The State warrant passed through several hands and was finally, some four or five months after the above transaction, presented by one of the tax collectors to the Auditor, when it was found to have been changed from the sum of one hundred dollars to nine hundred dollars. From each successive holder it reverted to the plaintiffs, who found then that

the indorsement of Charles H. Merritt was forged upon their check. They now sue the bank for having paid the check on this forged indorsement. The bank called Newman in warranty. The district court gave judgment in favor of the bank on the authority of the case of *Smith v. Mechanics' and Traders' Bank*, 6 An. 610; and the plaintiffs appeal. They call in question the correctness of the doctrine of that case, but contend that it differs entirely from the one at bar, upon the point considered by the Supreme Court as of the first importance, to wit: That Smith in drawing his check to the order of the supposed acceptors of the bill purchased by him and not to the order of the holder from whom he purchased, was deviating not only from the usual course of business, but from his own long established and regular custom; while in this case the plaintiffs draw their check according to the ordinary usual course of business, to the order of the payee of the warrant purchased, whose genuine indorsement was on it at the time. This difference does not seem to us to be such as to greatly benefit the plaintiffs. In each case the instrument purchased was a forgery at the time of the purchase, and the purchasers issued their checks in payment thereof to unknown persons, but in the name of the payees alike of the forged instruments, with the acknowledged purpose of throwing upon the bank the responsibility of paying to the right party. In each case the signature to the check was genuine and the checks were given to the guilty parties or their accomplices, who have easily and successfully deceived the drawers of the checks, who it seems had some suspicions as to the identity of the parties with whom they were dealing; as said in the Smith case, the first fault was committed by the plaintiffs in taking the forged or false instrument, and placing their check in the hands of a party who had every interest to use it as an implement of fraud. The plaintiffs can not successfully complain that the bank failed to protect them from the devices of a person who had, with so little effort, deceived and defrauded them. If the warrant purchased by them had been genuine, we presume they would not have complained of the payment of their check by the bank to any other party than Merritt, in whose favor it was drawn by them. It seems to us they are endeavoring to make the bank repair a loss which they brought on themselves by their own carelessness.

There is a feature in this case which makes it a stronger one in favor of the bank than the Smith case: It is that the bank in this instance paid on the genuine indorsement of the party presenting it for payment, the indorsement of Newman. We are aware of no law nor custom, which makes banks responsible primarily for the genuineness of every indorsement which may appear on checks drawn on them. We apprehend that they are not required to suspend payment until they are furnished with direct proof, that each indorsement preceding that of

the party presenting or depositing it, is genuine. They must know the party to whom they pay and the signature of the drawer.

The authorities cited by plaintiffs come under the general rule, that banks pay checks to order at their own risk, when their customers, in drawing the checks, have done nothing on their part to create or increase that risk, as in this case.

Judgment affirmed.

NO. 2755.—WILLIAM GRAYDON v. F. R. JUSTUS.

The defense to an action brought in the courts of this State, to enforce a judgment rendered in the State of New York, that the New York judgment was absolutely void for want of citation, must be pleaded specially so as to put the plaintiff upon his guard. If in such a suit a form of citation is shown in the record of the judgment in New York, then the presumption will be, under the provisions of section 1 of article 4 of the Constitution of the United States, "giving full faith and credit in each State, to the judicial proceedings of every other State," that such citation was made in conformity with the laws of New York, and is not therefore void for want of citation.

**A** PPEAL from the Seventh District Court, parish of Orleans. *Collens, J. Dirrhammer & Kennard*, for plaintiff and appellee. *C. Roselius & Alfred Philips*, for defendant and appellant.

HOWELL, J. This suit is brought on a judgment rendered by the Supreme Court of the city and county of New York. The defendant denies that plaintiff has "obtained any valid judgment against him," and that he owes anything to plaintiff. The record of the suit of William Graydon against F. R. Justus in said court was introduced in evidence, and from a judgment against him the defendant has appealed. The only question he presents is, the absolute nullity of the New York judgment for want of citation. He argues that, as the law of New York in regard to citation was not introduced in evidence, we must presume the law of that State is the same as ours, and must therefore hold that the "summons" to the defendant found in the record and signed by the attorneys of the plaintiff and served upon the defendant personally by their clerk, is without effect and the defendant was never cited.

This is a technical defense, which we think should have been specially pleaded, so as to put the plaintiff on his guard. Under the general allegation that, "the plaintiff has not obtained any valid judgment against this respondent," the plaintiff was not bound to know that he expected to introduce the law of New York on the subject of summons or citation to defendants. He was fortified in advance by the presumption in favor of the regularity of judicial proceedings, to rebut which it was incumbent on defendant to at least set up the particular defect or irregularity in the proceedings on which he relied for that purpose.

Graydon v. Justus.

Conceding that the presumption invoked by the defendant applies to a case like this, we think it overcome by the presumption arising from the provisions of section 1 article 4 of the Constitution of the United States, giving full faith and credit in each State to the "judicial proceedings" in every other State; the provisions of article 752 C. P., making judgments rendered in other States full proof in the courts of this State when properly certified, and the maxim "*omnia præsumuntur rite esse acta*." We will rather presume the "summons" on which the New York court based its judgment was in conformity with the law of that State, than that the form of citation required in Louisiana was necessary there.

The evidence before us, in our opinion sustains the judgment appealed from.

Judgment appealed from is therefore affirmed.

#### No. 3709.—A. LEVI & CO. v. B. WEIL & BROTHER.

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A citation issued by the Provisional Court of the United States, for the State of Louisiana, it served on the defendant before the war between the United States and the so called Confederate States had been declared at an end by the political department of the government, operated an interruption of prescription in favor of the plaintiff.

**A**PPEAL from the Ninth Judicial District Court, parish of Rapides. *Oreborn, J. William A. Seay*, for plaintiffs and appellants. *Ryan & White*, and *T. C. Manning*, for defendants and appellees.

HOWE, J. The only question in this case is whether prescription was interrupted by a citation from the Provisional Court of Louisiana, issued and served on the sixth November, 1865.

We are of opinion that this question must be answered in the affirmative. The Provisional Court at that date was still in existence. The political department had not yet declared the war to be at an end. The military authorities of the United States were still in control of New Orleans, and were still exercising an irresistible supervisory power over civil matters throughout the State. This is matter of history, and the specific dates appear in many decisions of this court. *Burke v. Tregre*, 22 An. 629; *Britton v. Aynar*, 23 An. 65.

The discrepancy between the names of the persons composing the plaintiffs' firm, as given in the petition filed in the Provisional Court, and as recited in this action, is not important. It is enough that the defendants were cited in the first suit, to answer a claim made upon the same obligation.

We think the plea of prescription was erroneously maintained. The cause was tried, however, on the merits, and we can therefore proceed to render a final judgment.

It is therefore ordered that the judgment appealed from be reversed, and the plea of prescription overruled, and that the plaintiffs, A. Levi

& Co., have judgment against Bernhard Weil and John Weil, defendants, *in solido*, for the sum of three thousand three hundred and twelve dollars and forty-nine cents, with eight per cent. per annum interest, on sixteen hundred and forty-three dollars and eighty-three cents from February 4, 1861, and on sixteen hundred and sixty-eight dollars and sixty-six cents from April 4, 1861, and costs of suit.

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No. 3753.—TONEY DOHERTY et als. v. F. V. LEAKE, Sheriff, et als.

A party in possession of real property under a recorded title ostensibly valid, can not be disturbed by any collateral proceedings instituted for the purpose of invalidating his title. Any inquiry looking to the nullity of such a title can only be entertained under the direct form of action. 23 An. 175

**A**PPEAL from the Seventh Judicial District Court, parish of West Feliciana. *Ratliff, J. Wickliffe & Fisher*, for plaintiffs and appellees. *Samuel J. Powell*, for defendants and appellants.

WYLY, J. The plaintiffs injoin the sheriff and the other defendants from selling the plantation described in the notice of seizure annexed to the petition, on the ground that it belongs to them and not to the seized debtor, Mrs. Charlotte Doherty, they having acquired a valid title thereto under execution of the judgment of *George Jackson v. the said Charlotte Doherty*, which judgment was superior in rank to that of the defendants.

The defendants deny that the plaintiffs have title to said property; and aver that the judgment under which they purchased it was at the time prescribed, that more than ten years elapsed before the suit for revival of the judgment was instituted; and although execution issued after the judgment of revival and the property was regularly adjudicated to the plaintiffs, their title was an absolute nullity. The court perpetuated the injunction, and the defendants appeal.

In *Anderson v. Carroll, Hoy & Co.*, 23 An. 175, this court said: "The evidence shows that the plaintiff was in possession under a recorded title and there was no simulation as charged; that he purchased under a judgment and mortgage ostensibly valid and superior in rank to that of the defendants. Such a title can not be treated as an absolute nullity, it can not be attacked collaterally. Actual contracts even though made in fraud of the rights of creditors, can not be annulled except by a direct action. Whether the mortgage under which the plaintiff purchased, was properly reinscribed, or whether the judgment was revived upon insufficient evidence or not, are questions that can not be inquired into in this form of attack."

Here the plaintiffs are in possession under a recorded title ostensibly valid, and under a judgment superior in rank to that of the defendants. This is an actual contract that can not be attacked collaterally under the settled jurisprudence of the State.

Judgment affirmed.

## No. 3514.—JOHN DAVIDSON v. EXECUTORS OF WM. SILLIMAN et als.

In this case the executors procured an order from the probate court to sell the property composing the succession of William Silliman solely for account of the succession. At the sale the widow in community was present, and bought more than one-half of the property. Plaintiff bid for a portion of the property, but failing to comply with the terms of his bid, and after being put in default the executors reoffered it for sale at his risk. To this second offering by the executors plaintiff prayed an injunction, on the alleged ground that the executors had failed to give him a title by procuring the signature of the widow to the act of sale, the property being owned in community with her, and only sold as the succession property of her husband, William Silliman, deceased.

Held—That the widow in community being present at the sale, and making no objection thereto, and having purchased a large portion of the property, she was by her own acts, concluded from thereafter making any objection to the validity of the sale, or of setting up any right or title to the property bought by the plaintiff, and that plaintiff was not, therefore, entitled to the injunction claimed on that account. That the widow having participated in the sale, she had ratified the same, and any further ratification was unnecessary on her part. That finally, the sale was valid without her signature to the act.

Held further—That the attorney's fee for dissolving the injunction may be assessed against the plaintiff as damages for wrongfully suing out the same.

**A** PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. J. D. Hill*, for plaintiff and appellee. *Race, Foster & E. T. Merrick*, for defendants and appellants.

HOWELL, J. The plaintiff alleges that at the succession sale of William Silliman, deceased, on the eighteenth December, 1869, he became the purchaser of certain real estate for a price, which, according to the conditions of the sale, was to be paid one-half in cash, the remainder in twelve months in notes secured by mortgage and vendor's lien, eight per cent. interest from date of sale and the clause of five per cent. for attorney's fees; that he was willing to comply with his engagement, and made a formal tender of the price of adjudication and a demand for a compliance with the obligations of the defendants through a notary, but his demand was refused; that the title which was offered to him was defective, because the property sold belongs to the community formerly existing between said William Silliman, deceased, and his surviving widow, but was sold as succession property and without the concurrence of the said widow, and because it is within the limits of the claim recently set up by Mrs. Myra Clark Gaines; that he demanded that the said widow Silliman should sign the act of sale, and that a guarantee against eviction be furnished, which were refused by the executors, who are now proceeding to sell the said property for his account and risk, which, if permitted, will inflict upon him a serious loss and injury; and he prayed that they be enjoined from making said sale and compelled to comply with his demands.

The executors answer by a general denial and the averments that under one and the same order, fourteen pieces of property in New Orleans, belonging to the late William Silliman, were sold; ten of which were bought by the widow for \$114,500, three by one John E.

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King for \$86,500, and the fourteenth piece by plaintiff, at \$18,000; making the total of \$219,000, of which the widow purchased more than her half interest therein, which was a ratification of the sale of all the property sold; all of which was well known to the plaintiff, who was frequently urged to comply with the terms of the sale; but he answered that he had not the money to make the cash payment and asked indulgence therefor, until the examination of the titles, which the said King was making through counsel, should be concluded, when he would comply if King did, which plaintiff refused to do, and they caused him to be put in default and proceeded to sell the said property for his account and risk, when, on the day preceding the day of sale, they were enjoined. They ask for a dissolution of the injunction and for damages, which they claim in reconvention, averring that the objections of plaintiff are frivolous, vexatious, and made for the sole purpose of delay.

After the case had been pending for over a year, and most of the testimony had been taken, plaintiff, on *ex parte*, motion discontinued so much of his suit as calls for the completion of the title to the property, with guaranty, etc., "leaving this suit purely as an injunction restraining defendants from selling the said property for his account and risk," without prejudice to the reconventional demand. To this the defendants excepted on the ground that the law prohibits a discontinuance of a portion of a suit after a reconventional demand is filed.

From a judgment perpetuating the injunction the defendants have appealed.

We think the discontinuance made by plaintiff of a part of his suit, did not affect or impair defendants' right to recover on their reconventional demand, and it is only in this respect that he is not permitted to dismiss or discontinue his suit. The plaintiff asked that defendants be enjoined not to make the sale complained of, and also be compelled to give him a satisfactory title to the property purchased by him. It is this latter demand which he discontinued, leaving his demand for an injunction of the second sale in force; and it is for this injunction the defendants have asked damages in reconvention. If the injunction is maintained, the reconventional demand must be rejected. If it is dissolved the damages, if any, will be such as have been caused by the injunction, and not by a decree on the demand of plaintiff for a good and perfect title to the property. What effect this change in the pleadings will have upon the character and scope of the judgment which must be rendered between the parties, need not be determined here. The general rule is that, "the plaintiff may, in every stage of the suit, previous to judgment being rendered, discontinue the suit on paying costs." C. P. 491. The excep-



tion or limitation is where the exercise of this right will tend to defeat or impair the demand of his antagonist. See 9 La. 310; 9 R. 210; 3 An. 660.

The question arises: Has plaintiff shown his right to a perpetual injunction of the second sale? If the title tendered by the defendants is not a good and legal title to the property purchased by him, he has. The objection that the property is within the limits of a claim set up by Mrs. Gaines, from which eviction may result, seems to be waived. The complaint here is, "that the title offered him is defective, inasmuch as the property sold belongs to the community formerly existing between William Silliman, deceased, and his surviving widow; that the property was sold upon the application of the executors of Wm. Silliman, under an order of the Court of Probates of East Feliciana, solely for account of the succession of the said Silliman, and without the concurrence of his said widow in community;" that it is necessary that the said widow should sign the act of sale tendered to her, but the executors have refused to obtain her signature thereto. To this the executors reply that the concurrence of the widow in community in the sale of the whole property is amply and conclusively shown by her attendance at the sale, and purchasing more than one-half thereof herself, which forever concludes her and her heirs in law and equity from contesting the validity of the said sale or attempting to disturb the plaintiff in his title or possession; that the *proces verbal* of the sale of all the fourteen stores, including the one to plaintiff, was annexed to and made a part of the first act of sale to Mrs. Margaret A. Silliman, and all subsequent acts of sale to said Mrs. Silliman, to said J. E. King, and the one tendered to the plaintiff, refer to said *proces verbal* as the sale, and to the notarial act as merely in confirmation of said adjudication at public auction on the eighteenth day of December, 1869, by N. J. Hoey, of C. E. Girardey & Co., auctioneers, the *proces verbal* of which is deposited in this office, and annexed to an act of sale to Mrs. Silliman, dated twentieth December, 1869; that all these facts were and are well known to the plaintiff, and constitute as complete a concurrence in and ratification of the sale as if she were to sign the act as demanded by him, and that they can not be required to do a vain thing.

This, to us, seems so plain as scarcely to need demonstration. In no stronger manner could Mrs. Silliman show her concurrence in the proceedings resulting in the sale. It is not simply a ratification by her after the sale, but a participation in the sale—a continuing, manifest authorization of the sale, which she can not repudiate. *Blanchard v. Allain*, 5 An. 367, and authorities there cited. No such bad faith on her part can be presumed or permitted. Whether the judgment in this case will be *res judicata* against her as she is not a party to the suit, is not a material question. The facts of this case show that as

between the plaintiff and the defendants, the executors of William Silliman, deceased, the latter have tendered to the former a perfect and complete title—as to the objection raised—to the piece of property purchased by him at the succession sale on the eighteenth December, 1869, and that he had no reasonable ground to refuse its acceptance. The apprehension that the widow or her heirs might at some future day institute suit against him for the property on the ground set up by him, is shown by the defendants to be without legal foundation.

If it be said that the act of sale or written title must, on its face, be complete and show that the widow has parted with her rights, the reply is, that nothing in the act indicates that she has any right whatever to the property. It is only upon an examination of the records and transactions in relation to the origin and chain of title that it is discovered that the property belonged to the community, and the same examination shows with equal clearness that the widow is concluded from setting up any claim as owner of one-half of this particular property. Her rights, as widow in community, are dependent on a settlement of the community, and the record shows that she has consented to the sale of this property as belonging to the succession of William Silliman, as is enunciated in the *proces verbal*, to which she is a party. The injunction should have been dissolved.

The defendants claim the damages which may be allowed on the dissolution of an injunction where an execution of a judgment is enjoined, and quote the laws and authorities on that subject. They do not apply to a case like this. The injunction here is to prevent a sale, not under a judgment against plaintiff, but under a law, which, under certain circumstances, authorizes the sale to be made at his risk, and makes his liability depend on the contingency that the price of the second sale is less than that of the first, and measures the damage to the deficiency in the price and the expenses incurred subsequent to the first sale, for which the first purchaser is the debtor to the vendor. R. C. C. 2611. These can not be ascertained until the second sale is made, and as the pleadings now stand, a dissolution of the injunction permits this second sale to proceed. The attorney's fee in this suit, which is specially claimed, may, however, be allowed.

It is therefore ordered that the judgment appealed from be reversed, and that the injunction herein be dissolved, and that defendants recover of plaintiff on their reconventional demand the sum of one thousand dollars as attorney's fee, without prejudice to their right of action, under article 2611 R. C. C.

Plaintiff and appellee to pay costs in both courts.

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WYLY, J., *concurring*. The plaintiff had no right to require Mrs. Silliman to join as covendor in the sale. This was not part of the

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*aggregatio mentium*, resulting from the offering and the adjudication. It was not stipulated in the order of sale, in the advertisement and in the offering. The title offered was good and valid, and such only as the purchaser had the right to demand. It is not always necessary for the widow in community to join as vendor in the sale of community property. Where such property is sold to pay debts, or where the widow has renounced the community, it is not necessary. Nor is it necessary in a case like this, where the widow sanctioned and ratified the sale, the *proces verbal* showing that she was the adjudicatee of at least two-thirds of the entire property sold. This ratification was an estoppel as effectual as that resulting from the renunciation of community. The title offered was, therefore, not a mere equitable title; it was a legal title, just as binding on the widow who ratified the sale, as her renunciation of community would be. I therefore concur in this case.

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No. 2993.—MRS. M. J. VEAZIE v. SARAH ANN STOKES.

24	229
114	463

In an action by the heir to annul a disguised donation, on the ground that it was made by the deceased to a person interposed, the plaintiff must show with legal certainty that the purchase money was not the donee's, or that the transactions were really donations from the donor to the person interposed.

**A**PPEAL from the Seventh District Court, parish of Orleans *Col-lens, J Samuel R. & O. L. Walker*, for plaintiff and appellant. *W. H. Hunt*, for defendant and appellee.

This case was tried by a jury in the court below.

Howe, J. The plaintiff, representing herself to be sole heir, with benefit of inventory, of Elijah Smith, deceased, brought this suit to nullify a disguised donation of certain property alleged to have been made by Smith to the defendant, his concubine, and to declare such property to belong to the succession of Smith.

The cause was tried by a jury who rendered a verdict for defendant, and plaintiff appealed.

We have given a careful examination to the testimony in this case, and are not satisfied that the verdict was erroneous.

The property in question was not conveyed by Smith to defendant, but by third persons. It is not established with legal certainty that the purchase money was not the defendant's, or that the transactions were really donations from Smith to defendant, in disguise. Nor is it established with legal certainty that, even if the money paid by defendant for the property was donated to her by Smith, it exceeded in amount one-tenth of his movable property. Rev. C. C. 1481.

Judgment affirmed.

Rehearing refused.

No. 3750.—HYAMS & JONAS v. HENRY M. ROGERS, Tutor, etc.

Ordinary partners are not bound in *solido* for attorney's fees for services rendered the firm under the employment by one of its members. In such a case each one of the partners is bound for his virile share, if no agreement has been made between the attorney and the partner who employed him. R. C. C. 3872, 3873.

**A** PPEAL from the Ninth Judicial District Court, parish of Rapides. *R. W. Bowman*, attorney at law, judge *ad hoc*, in place of Orsborn, judge, recused. *T. C. Manning*, for plaintiffs and appellees. *H. S. Losce*, for defendant and appellant.

HOWE, J. This is an action for attorney's fees against the representative of the estate of W. H. Orsborn. The services were rendered, as alleged, by plaintiffs "to the firm of J. & W. H. Orsborn," a planting partnership. J. Orsborn has gone into bankruptcy, and W. H. Orsborn has departed this life.

There is no doubt that the plaintiffs performed the services at the request of J. Orsborn for the firm, and we do not perceive any force in the reasons urged by the defendant, who has appealed, for a reversal of the judgment.

The prescription of three and five years can not apply. The services of the plaintiffs as attorneys ceased in the case in which they were employed in May, 1869, and this suit was instituted in April, 1871.

The court *a qua* gave judgment against defendant as representing the succession of W. H. Orsborn for half the fees. The appellee has prayed for an amendment of the judgment in such way as to compel the defendant to pay the whole claim of plaintiffs, on the ground that by art. 3026 of the Revised C. C. it is provided that "if the attorney has been empowered by several persons for an affair common to them every one of these persons shall be bound in *solido* to him for all the effects of the procuration."

This article is copied *verbatim* from the Code Napoleon, art. 2002, which, in its turn, is a statement of the civil law doctrine, as laid down by Pothier, Du Mandat, No. 82, and fortified by the authority of Paul in L. 59, § 3, *ff. Mandatum*. And under this system it has been decided in France that solidarity would exist in favor of an attorney, a syndic in insolvency, an arbitrator, an expert appointed at the request of parties and in their common interest, and a liquidator of a commercial partnership. See Dalloz, 1830, 2, 105; Troplong, Du Mandat, No. 691. But, as remarked by M. Troplong, No. 693, it is to be observed that in order that solidarity may exist as against the principals, two conditions are required—

*First*—That the mandatary shall have been constituted by several persons, and,

*Second*—That the affair should be common to them, and therefore the article would neither apply where several persons by a single in-

Hyams &amp; Jonas v. Rogers, Tutor, etc.

strument should empower an attorney for affairs not common to them, nor where one person should empower for an affair of common interest to several.

If John Orsborn and W. H. Orsborn, several persons, had employed plaintiffs to protect their common rights they would doubtless have been bound *in solido*. But we find no precedent in decisions or commentary for solidarity in such a case as this, where one partner of an ordinary partnership employs on its behalf and for its protection a mandatary. He may bind himself possibly for the full amount of fees. He may bind the partnership for the full amount. But construing the article above cited with articles 2872, 2873, which limit the liability of the ordinary partner to his virile share, we are constrained to think that the obligation of W. H. Orsborn, who did not actually join in the act of empowering the plaintiffs, springing as it does from the fact merely that they were employed by and for an ordinary partnership of which he was a member, must be limited to one half their fees.

Judgment affirmed.

NO. 3765.—R. L. PRUYN v. JAMES H. GIBBENS.

The affidavit of a defendant that he is sick and unable to attend court as a witness on the day of trial, is not good cause for a continuance of the case, if it be admitted by the opposite party that he would, as a witness, if present, swear to what he had set forth in the affidavit. C. P. 466.

**A**PPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Posey, J. Favrot & Lamon* and *A. S. Herron*, for appellee. *Fuqua & Callihan*, for appellant.

Howe, J. The defendant, who has appealed, states in his brief that "the thing of which he most complains and wishes to press upon the attention of this court is the harsh and extraordinary exercise of power on the part of the judge below in forcing him to trial at the time he did."

The answer, a general denial, was filed on fourth December, 1871, and on the same day a motion for continuance, in which the defendant's counsel state that their client has been absent from the State; has only returned within the last two weeks; has special defenses to make, which they have been unable to learn from his wife with sufficient clearness to enable them properly to set up, or present them to the court.

This motion was overruled, and the case reassigned for seventh December, 1871.

On the sixth December defendant filed an amended answer, from which it appears that counsel must have been thoroughly acquainted with his grounds of defense.

On the day fixed for the trial of the case, defendant filed another motion for continuance, supported by affidavit. The reading of this motion will show that defendant must have had a conference with his counsel, and apprised them of all the facts upon which his defense rested. He swears as to the facts he intends to prove both by his own and Viglini's testimony.

It was admitted by plaintiff that if defendant and Viglini were present they would swear to the facts as stated in the affidavit for continuance. They are the only two witnesses of whose absence defendant complains. Defendant's affidavit does not show that he was not aware of the witness' intended departure, and could not have obtained his testimony. 15 L. 276.

The district judge overruled this second motion for continuance, and we do not think he erred in so doing. The requirements of art. 466, C. P. were fulfilled by plaintiff's admission; and we are not aware of any rule of law which prescribes that in such a case a plaintiff shall not recover his judgment until the defendant recovers his health.

Upon the merits there is some conflict of testimony as to the precise amount due, but we do not feel authorized to disturb the judgment. At the same time we are not satisfied that damages should be awarded for a frivolous appeal.

Judgment affirmed.

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No. 2542.—W. H. CLAY et als. v. E. O'BRIEN.

Where the heirs of a deceased person seek by petitory action to recover real estate from the owners who have acquired title thereto at a judicial sale to enforce the payment of taxes due by said property, the burden falls upon the heirs of showing that the proceedings to enforce the payment of the taxes assessed on the lands were irregular and illegal. If in such an action the record discloses that the requirements of the law have been complied with in making the sale, then, and in such case the title will be declared good and valid, and the petitory action by the heirs will be dismissed.

**A**PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. A. & M. Voorhies*, for plaintiffs and appellees. *Cotton & Levy*, for defendants and appellants.

**HOWELL, J.** This is a petitory action, in which the plaintiffs, as legatees of Mrs. A. M. Helfer, seek to recover of defendant twelve lots of ground in the square bounded by Bienville, Napoleon, Solomon and Conti streets, in New Orleans, purchased by said Mrs. Helfer on twenty-seventh May, 1837. The defendant sets up title under a sale made on twenty-eighth January, 1860, by virtue of an order of seizure and sale in the case of C. Roselius, receiver, v. Three Squares of Ground, instituted under the fifth, sixth and seventh sections of act No. 49 of 1839, to enforce the mortgage created by said act in favor of the New Orleans Draining Company to secure the tax assessed on the land to

be drained; he avers that the said sale having been made in conformity to law can not thus be attacked collaterally, and asks that if he be evicted he be paid the price of the adjudication before possession is given to plaintiffs. Eugene Latere, the adjudicator at said sale, intervened as defendant, and from a judgment in favor of plaintiffs both defendants have appealed.

*First*—Plaintiffs deny that there was a compliance with the said act of 1839 in making the assessment, appraisalment and advertisement of the said property.

It seems from the record that the assessment was made on the whole square bounded by the above named streets, as belonging to unknown owners, and the advertisement was made of the whole square. The act directed a plan of the property within the draining district or section to be made by the company, showing as much as possible the subdivision of the property and the names of the proprietors; authorized the necessary assessment to be made on each portion of the property as found and a mortgage and privilege decreed thereon, which decree was to be recorded and an order of seizure and sale allowed against the property in the name of the proprietors, or *in rem* as belonging to unknown persons, if, notwithstanding diligent inquiry, the draining company should not be able to ascertain who are the owners, and upon making certain advertisements, containing a clear description of the property referred to, the fact of the assessment, and that the owners are unknown, in order that the owners may appear, and upon the appointment of a curator *ad hoc*. These formalities appear to have been observed. The act also directed the property to be sold without appraisalment.

*Second*—The seizing and selling for tax three squares of ground is irregular and in violation of law.

In what respect it is irregular and illegal is not explained. The proceeding was against the said property as belonging to unknown owners, and we do not see in it anything contrary to the provisions of the act in question or any other law relating to the subject. The squares were correctly described and the necessary notices published.

*Third*—The company could not seize and sell the property of plaintiffs to pay the tax owing by other parties. We find in the record no evidence that such was the case.

*Fourth*—The seizure and advertisement of the square bounded by certain streets to pay \$400 56, and selling one-half thereof for \$650, and staying the sale for the other half, as shown by the sheriff's return, is irregular and the whole proceedings are vitiated thereby. And if, as contended, it was seized and sold to pay half the tax, then the proceedings were defective, as they do not show that the writ was enforced for such purpose.

The record shows that the said square was assessed for \$400 56 with ten per cent. interest from twentieth January, 1851, and costs of advertising, the one-half which, at the day of sale, in 1860, with the city and State taxes due amounted to not greatly below the price of adjudication. It has been decided by this court that the half of a piece or tract of land can be legally sold under an advertisement of the whole if there is a legal cause for staying the sale of the other half. See *Losee v. DeLacey*, 23 An. 237. As the advertisements were intended in part to give owners an opportunity to make themselves known, we may well presume from the proceedings that the owner of the half not sold made himself known and paid his proportion of the assessment on the whole square. At any rate there is no such irregularity in this respect as to render the sale absolutely null.

*Fifth*—The sale was in palpable violation of sections five and seven, in selling the property for cash; it should have been sold on one and two years' credit as therein directed.

By the said sections the owner had the privilege of giving notes at one and two years if his tax exceed \$100, and have the property sold accordingly, but it is not made the duty of the company to so sell.

*Sixth*—The act provides that each owner's property shall be assessed and proceedings carried on against him for the collection of the assessment. This is true where the owners are known or can be ascertained, but not where the owners are unknown.

*Seventh*—The proceedings do not show that the receiver used due diligence to discover the owners of this property, and the sale of it as the property of unknown owners was not warranted. The question of what was due diligence at the time, on the part of the receiver, can not properly be determined in this suit, to which he is not a party, and we will presume he did his duty. Had the law prescribed what particular acts would constitute diligent inquiry, it would present a question like that of particular formalities necessary in making such forced sales. The facts that Mrs. Helfer's title was recorded in 1837; that her succession was opened in the probate court and the plaintiffs were put in possession of the property as her legatees; and were represented by a tutor and undertutor, are not facts that the receiver was bound to know. The assessment rolls of the city or State are not in evidence, and we can not say in whose name this property was assessed, conceding that it was the duty to have the said rolls examined.

*Eighth*—The advertisement, seizure and sale of "square No. 373, bounded by Bienville, Solomon, Conti and Napoleon streets," where the square was described as No. 25 in the act of sale to Mrs. Helfer, and on a plan in the office of the notary who passed said act, is not such a description as to serve as a notice of the proceedings to plaintiffs, the owners of half of said square.



The names of the streets bounding the square were given, and the difference in the numbers given in the two plans, is not fatal. The plan of the company, showing the No. 373, was made official by the law. Our conclusion is that the law was complied with in the proceedings under which defendants purchased.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of defendants with costs in both courts.

NO. 3894.—CITY OF NEW ORLEANS v. EDWARD J. RIGNEY.

A stipulation in a contract of lease to collect wharfage for a given period of time, which reserves the right to the city to have it annulled if the other contracting party fails to comply with his obligations, is a law between the parties, and the failure to comply with his obligations, on the part of the other contracting party, gives the city the right to have the contract annulled by judicial proceedings.

34	235
50	572

**A** PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. George S. Lacey*, city attorney, for plaintiff and appellant. *Wooldridge & Thomas*, for defendant and appellee.

This case was tried by a jury in the court below.

**LUDELING, C. J.** This is an action by the city of New Orleans, as successor to the rights of the late City of Jefferson, to annul a contract between the defendant and the City of Jefferson, on account of the failure of the defendant to comply with his obligations.

The city asserts this right under a clause in the said contract, which is in the words following:

"It is understood and agreed hereby that any failure or refusal on the part of the said Edward J. Rigney, to pay the said notes at maturity, shall operate to annul and cancel this contract."

The evidence shows that one of the notes was due on the thirteenth day of November, 1871, and that it was presented for payment to the defendant, Rigney, and was duly protested for non-payment. That on the following day the agent of the defendant offered to pay the note to the Deputy Administrator of Finance, who refused to receive payment, because he had been instructed not to receive payment thereof after the protest.

The defendant insists that the clause above quoted does not authorize the construction contended for by the city, as the note is not domiciliated, and he further insists that no demand was made of him until after three o'clock of the last day of grace, when it was not convenient for him to make the payment, on account of the lateness of the time of day. And he further insists that under article (2541) 2563 R. C. C., he had the right to make payment and prevent the rescission of the contract at any time before judicial demand.

The judge of the district court charged the jury to that effect.

We do not conceive that article 2563 C. C. applies to this contract, which is a lease or sale of the right to collect wharfage in Jefferson City, for a limited number of years. Article 2563 applies to the "sale of immovables."

The clause aforesaid of the contract is the law between the parties. It is an accidental stipulation, which belongs neither to the essence nor to the nature of the contract, but which depends solely on the will of the parties. R. C. C., article 1764. They had a right to stipulate that the contract should be null if the obligor did not pay on a particular day, and we think they did so stipulate. The clause is meaningless unless it gave the right to the city to annul the contract on the failure of the defendant to pay the notes as they matured.

"Where a term is given or limited for the performance of an obligation, the obligor has until sunset of the last day limited for its performance to comply with his obligation, unless the object of the contract can not be done after certain hours of that day." R. C. C., article 2057. By the terms of this contract the defendant was in default by the mere failure to pay within the term specified. C. C. 1911, No. 1. But the evidence shows that he was put in default by a demand and protest. C. C. 1911, No. 2.

"The object of the putting in default is to secure to the creditor his right to demand damages or a dissolution of the contract, so that the debtor can no longer defeat this right by executing or offering to execute the agreement. After the debtor has been put *in mora* his offer to execute his engagement comes too late and can not be listened to." 8 R. 161; 20 An. 292; Toul., vol. 6, p. 253, No. 246.

The defendant knew the term within which his obligation should be performed, and it was his fault if he neglected to perform it; and Toullier says: "Ainsi les tribunaux, qui ne sont établis que pour juger les faits et appliquer la loi, excéderaient évidemment leurs pouvoirs, et s'exposeraient à la censure, si, sous prétexte d'équité, ils se permettaient encore de modifier une pareille convention, ou de n'y point avoir égard."

The plaintiff has prayed for damages but they have failed to make satisfactory proof of any.

It is therefore ordered and adjudged that the judgment of the lower court and the verdict of the jury be set aside, and it is further decreed that there be judgment in favor of the plaintiff against the defendant, canceling the contract between the City of Jefferson and the defendant, and perpetuating the injunction.

It is further decreed that the unpaid notes of the defendant be canceled and be delivered to him, and that defendant pay costs of both courts.

## No. 3906.—SUCCESSION OF CHARLES MASSIEU—Opposition of Mrs. E. LEBLANC.

An exception to the authority of an attorney to bring a suit should not be sustained, if the evidence offered on the trial leaves it in doubt as to whether the attorney was prosecuting the suit without the sanction of his client, because in all cases of doubt the authority of the attorney is presumed. In this case the authority of the attorney to bring the suit was shown. But exception being taken to his authority to prosecute the suit, application was made to the court for a continuance to enable the attorney to procure the testimony of the client, a non-resident, on the point. The court refused the continuance on the ground that a telegram had been shown, purporting to be from the client, showing a change of mind.

Held—That the continuance should have been granted, because the telegram, if true, did not make it certain that the client had changed her mind about the suit.

**A**PPPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. E. Bermudez and J. Culbertson*, for executors, appellees. *G. Schmidt*, for appellant.

LUDELING, C. J. Charles Massieu died in the City of New Orleans on or about the third of November, 1871, and on the thirteenth of December, 1871, his executors, DeFerriet & Monrose, filed their final account and tableau of distribution. Whereupon Mrs. LeBlanc filed a petition, alleging that she had a claim against the estate for ten thousand dollars, based on the following disposition *mortis causa*:

“Good for ten thousand dollars, payable to Miss Ernestine L. Chauveau, after my death, value received.

“New Orleans, September 26, 1842.

“C. MASSIEU.”

She prayed that her claim should be recognized as valid, and that her opposition to the tableau of distribution should be sustained.

The executors filed an exception to this suit, on the ground that the attorney who instituted it acted without authority. Before the trial of the exception, the attorney who instituted the suit made an affidavit for a continuance to procure the testimony of his client, who resides in France. He swears that he expects to prove by her that she did authorize and employ him to bring this suit. The continuance was refused on the ground that it was unnecessary, inasmuch as the judge was satisfied from a telegraphic dispatch which purported to come from her, that she had revoked her authority. The dispatch is in the following words:

“Voulant pas entamer proces, renvoie le billet Massieu.

“LEBLANC.”

It was addressed to Madame Francis, care of Dieter Gladstein, New Orleans, and it is dated December 30. Mrs. Francis says she is not certain that the telegram came from Mrs. LeBlanc. The letters from LeBlanc to Mrs. Francis and G. Schmidt, the attorney who instituted the suit, clearly prove that she authorized him to institute the proceedings, on condition that she should not be called upon for any

expenses unless she succeeded in her suit. We think, under the circumstances, that the continuance should have been granted.

Aside from the proof in the record, the authority of the attorney will be presumed. 9 M. 88; 10 M. 639; 12 R. 95; 3 An. 558; 5 An. 118; 10 An. 66.

We do not regard the dispatch received by Mrs. Francis as proof of a revocation of the authority to the attorney to prosecute the suit. He had received no instructions on the subject from his client, and it is probable that she may have sent the dispatch under a misapprehension of the facts. It is certain that her wishes, as expressed in her letters, are in direct conflict with those expressed in the dispatch, as interpreted by the judge *a quo*, and we will not easily believe that she wantonly violated her contract with her attorney.

It is therefore ordered and adjudged that the judgment of the district court be annulled, and that there be judgment overruling the exception and remanding the cause to be proceeded with according to law. It is further ordered that the costs of appeal be paid by the succession.

NO. 3839.—BABCOCK & KERNOCHAN v. A. C. WATSON.

A defendant who alleges that the consideration of the obligation on which suit is brought grew out of an illicit transaction between himself and the plaintiffs in order to succeed in his defense, must support his allegations by clear and undisputed evidence. The doctrine in the case of *Weaver v. Anfour*, 20 An. 1, is reaffirmed by this decision.

**A**PPEAL from the Thirteenth Judicial District Court, parish of Tensas. *Hough, J. Julius Aroni*, for plaintiffs and appellees. *Farrar & Reeves*, for defendant and appellant.

This case was tried by a jury in the court below.

Howe, J. This suit was instituted upon a promissory note given by defendant in 1866, in settlement of an account of plantation goods sold to him by plaintiffs in 1861.

His principal defense is that these goods were knowingly and unlawfully furnished to him by the plaintiffs for the equipment of a rebel battery, organized by defendant, and known as Watson's Battery. In brief he avers that the plaintiffs were co-conspirators with him against the Government of the United States and he invokes their common turpitude as a defense.

The cause was tried by a jury, who rendered a verdict for plaintiffs, and from the judgment entered thereon the defendant has appealed.

The jury doubtless believed that the defendant did not make out his case with that clearness which such a suspicious sort of defense requires (20 An. 1), and we are not prepared to say they were mis-

taken. The defendant had the benefit of his own testimony before the jury (while the plaintiffs were represented only by a written deposition of one of them); and he began his testimony with the rather damaging admission that he would not swear that the account presented was the one on which the note was based. He confesses that the dozen linen cambric handkerchiefs and the dozen half cotton hose, set forth in the account, were probably not for the use of his cannon-eers, and it is likely the same might be said of "six pieces of brown cotton," also mentioned in the bill. He fails to account for the fact that about half the goods were purchased by him in January and February, 1861, two months before the war began, while his battery was not organized till nearly four months after the war broke out, or in August, 1861. He fails entirely to show any knowledge, on the part of plaintiffs, of the destination of the goods. He says:

"I represented to Mr. Deery, their clerk, who conferred with the members of the firm (whom I don't think I ever knew) that the articles purchased as enumerated were for army use, and the house thereupon made a reduction in the price. \* \* When I gave the note I stated to the party to whom I gave it, that the goods purchased had been for army use, and that he ought to make a reduction in the price."

If this testimony refers in the first instance to the time the goods were purchased, it is contradicted by testimony on behalf of plaintiffs, which shows that the goods were charged at full prices, and by testimony for defendant, which shows that they were purchased not by defendant personally but, in his absence from New Orleans, by his factor, now deceased, at the request of his sister-in-law, who had no personal interview with either Deery or plaintiffs about them, and states that she can not say the plaintiffs were aware of their destination. And furthermore, if the plaintiffs made this reduction in 1861, when the goods were purchased, why did the defendant when he gave the note in 1866, ask for a reduction for the same reason? But if the testimony above quoted refers throughout, as seems most natural, to what took place in 1866, when it seems a reduction was made by throwing off some arrears of interest, it can not prejudice the plaintiffs' right growing out of a sale in 1861.

The testimony for plaintiffs goes to disprove any knowledge of the destination of the goods, and this seems credible enough. Why should dry goods merchants supplying plantation goods to the factor of a planter, suspect that he was about to beat his plowshare into a sword, and use such innocent and bucolic materials as "stripes," "jeans" and "linseys," to equip a company of artillerymen?

Judgment affirmed.

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McLean, Testamentary Executor, v. Keegan & McCann and Guillaume.

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670.—W. S. McLEAN, Testamentary Executor, v. KEEGAN & McCANN  
and EUGENIE GUILLAUME.

A title to real estate is acquired by thirty years' peaceable and uninterrupted possession as owner.

In a suit for the recovery of real estate on the ground that the title of the possessor is simulated, the plaintiff can not be permitted to treat the title of defendant as a pure simulation, and at the same time urge the sale as real, for the purpose of defeating the plea of prescription.

**A** PPEAL from the Second District Court, parish of Orleans. *Whitaker J. C. B. Singleton* and *E. D. White*, for appellant. *O. Roselius*, for appellee.

LUDELING, C. J. The testamentary executor of John Hagan, the brother and universal legatee of Thomas Hagan, instituted this petitory action to recover from defendant a lot of ground and the buildings thereon, situated on Canal street.

Eugenie Guillaume answered that she is the rightful owner and possessor of the property sued for, under and by virtue of the act of sale mentioned in plaintiff's petition, which act is dated the twenty-eighth of June, 1828. That even if the said act were a disguised donation (which, however, is denied), still her title had become valid in law, inasmuch as John Hagan, the universal legatee and only heir of Thomas Hagan, had knowingly, publicly and repeatedly, before and after the death of Thomas Hagan, recognized, given effect to, approved, ratified and confirmed the same, and thus placed it beyond the power of his heirs or executors to attack her title. She also pleaded the prescription of ten and thirty years.

It appears that Thomas Hagan sold to Eugenie Guillaume the property now in dispute, on the twenty-eighth of June, 1828. This is the act which is attacked as a disguised donation to a concubine.

Eugenie Guillaume sold the same property to Thomas Hagan on the seventeenth of April, 1833. On the twenty-second of April of the same year, Hagan sold it to John G. Greeves, who sold it to Nicholas Sinnott on the third of May, 1833; and on the thirteenth of May, 1833, Sinnott sold it to Eugenie Guillaume.

Thomas Hagan died in Paris on the sixth of April, 1850. By his will his brother John Hagan became his universal legatee and sole heir. John Hagan became Eugenie Guillaume's agent for this property before the death of Thomas Hagan; his letters and accounts rendered to her show that as early as 1846 he was her agent, paying taxes and receiving rents on the property. And he continued to act as her agent for the property after the death of Thomas Hagan, up to the period when he left this country, when Mr. John Clay was appointed by him to act for the defendant. In 1851 John Hagan advised the defendant to sell the property.

John Hagan died in September, 1857, in France, leaving a will, whereby he appointed four executors, only one of whom qualified and received letters of executorship.

The conclusion we have reached in regard to the plea of prescription, renders it unnecessary to decide the other questions, which have been learnedly and ably discussed by counsel.

It is alleged in the petition that the sale by James Hagan to the defendant was made on the eighth of June, 1828, and the deed in evidence proves that fact. This suit was instituted on the twenty-ninth day of March, 1860; consequently more than thirty years elapsed between the date of the deed and the institution of this suit. And from the testimony of James Hopkins, a witness for the plaintiff, who was intimate with Thomas Hagan and the defendant, it appears that Eugenie Guillaume and not Thomas Hagan was in possession of the property before they went to Europe. He says: "I know the property alluded to in these proceedings. He (Thomas Hagan) never lived there; his residence was not there. He resided at the corner of Customhouse and Royal streets. Eugenie Guillaume, the person who lived with Thomas Hagan, lived there; she lived there a length of time; she lived there up to the time she went away."

James Puech, a witness for plaintiff, says: "She lived on the property referred to; she was living there until she went away. \* \* Thomas Hagan lived there with her."

Mr. Thomas Clay says: "I always knew her to occupy it (the premises) until she went to France, some twenty-five years before she left."

We conclude from the foregoing and other corroboratory evidence that the defendant had occupied and possessed, as owner, the property in dispute more than thirty years before the institution of this suit.

The plaintiff contends that Thomas Hagan and the defendant resided on the premises at the date of the sale or donation, and continued to reside together until they left for Europe. We think the evidence leaves no ground for a reasonable doubt, that at the time of the sale, the eighteenth of June, 1828, Thomas Hagan did not reside at the house sold. Hopkins says: "He resided at the corner of Customhouse and Royal streets." It is true Puech says: "Hagan lived there with her." But this statement only confirms the testimony of Hopkins. It means at most that he visited her at her residence, and stayed there with her sometimes.

The plaintiff further contends that the prescription only began to run from the death of Thomas Hagan, the sixth of April, 1850; that otherwise a prohibitory law can be violated with impunity, if the donor should live thirty years after the donation. Practically such might be the effect. But it would not result from the prohibited act

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McLean, Testamentary Executor, v. Keegan & McCann and Guillaume.

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of donation, which would remain always null, but simply from the fact of actual and uninterrupted possession, during the time required by law to acquire the ownership. C. C. arts. 3499, 3500; Troplong de la Prescription, vol. 2, Nos. 846, 820; Marcadé, vol. 5, p. 99.

The plaintiff further contends that, granting that the act of June, 1828, transferred the legal possession to the defendant, then the same effect must be given to the act by which the defendant resold the property to Hagan in 1833, causing the prescription to commence its course, *de novo*, from that date; and that the purchase from Sinnott, in 1833, operated an interruption of prescription; that though these acts were not good as sales, because "they were all simulated and tainted with the original vicio, they are efficacious as interruptions of prescription." The fallacy of this reasoning is in supposing that in recognizing the defendant's possession, effect is given to the act of sale; whereas it is the fact of the actual possession of the defendant which alone gives her a title.

The plaintiff can not be permitted to allege and treat the acts of sales to and from the defendant as pure simulations, and at the same time claim that they interrupt prescription. If it be conceded that all these sales were simulations, and we disregard them entirely, still we are satisfied from the evidence and the admissions of the plaintiff, that the defendant had been in the actual public and uninterrupted possession of the property, as owner, for more than thirty years, when this suit was brought; and the plea of prescription should be maintained.

It is therefore ordered and adjudged that the judgment of the district court be affirmed with costs of appeal.

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No. 3665.—M. MARKS, Administrator, v. THE TOWN OF DONALDSON-VILLE.

The gratuitous investiture by the State, in a municipality, of the administration of a public ferry, with the right to collect and enjoy the revenues arising therefrom, is not a contract between the State and such municipality, and the State may, therefore, through her legislature, at any time, resume the control of such ferry herself or vest it elsewhere. The doctrine in the case of police jury of Bossier v. Shreveport, 5 An. 661 is reaffirmed by this decision.

**A**PPEAL from the Fourth Judicial District Court, parish of Ascension. *Beauvais, J. R. N. Simms*, for plaintiff and appellee. *Nichols & Pugh*, for defendant and appellant.

HOWE, J. The question presented in this case was very fully discussed and finally settled in Police Jury of Bossier v. Shreveport, 5 An. 663.

Following the language and theory of that case, we may say in this, that "the State, through its legislature, in the exercise of its sovereign



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Marks, Administrator, v. The Town of Donaldsonville.

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power to regulate ferries, which are parts of the public highway, conferred in former times upon one of the subdivisions of the internal administrations of the State," namely the town of Donaldsonville, the right to keep a ferry across the Bayou Lafourche, and to receive the revenues therefrom, which revenues the State itself might have retained had it so chosen. This right, which it is not pretended was perpetual, was conferred "without any consideration inuring to the State, or any onerous condition imposed on the town." There was no contract between the State and the town, nor any right "vested" in the latter.

When, therefore, in 1870 the State, through its legislature, chose to resume its contract over this ferry or public highway, and to confer the right to keep it on the persons whom the plaintiff represents, upon condition that they should pay the town a certain sum per month, the town has no legal right to complain.

It may be that the revenues thus coming to the town from this highway of travel may be reduced in this way, but if the State, through its Legislature, might have resumed the right *in toto*, and thus taken the revenue away from the town entirely, it certainly can not be good ground of complaint that there has been merely a reduction made.

With the policy of the particular act of the Legislature involved in this case, we, as judges, have nothing to do.

Judgment affirmed.

Rehearing refused.

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#### No. 3498.—SUCCESSION OF CHARLES KOCK—Opposition to account of Testamentary Executor.

The designation and fixing by the testator in his will the per cent. which his executors are to receive as compensation for administering his estate, does not constitute them universal legatees, or legatees by universal title. And they, the executors, are not therefore bound to contribute to the payment of the debts.

Where the rate or per cent. of commissions allowed the executors has been fixed by the testator for administering his estate, they are entitled to such rate of commissions on all the property inventoried as composing the estate, and the heirs who have postponed by legal proceedings the sale of certain property which the executors are directed by the will to sell, can not make successful opposition to the payment of the commissions, on the ground that the property has not been administered upon and sold according to the wishes of the testator.

**A**PPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. v. W. O. Denegre*, for opponents and appellants. *J. A. Bosier, and Clark, Bayne & Renshaw*, for executors appellees.

WYLY, J. The question presented for adjudication in this case is, shall the testamentary executors of Charles Kock receive as compensation for their services the commissions stated in the will, on the pro-

ceeds of the entire estate, or only on the proceeds remaining after the payment of all the debts? In the will we find the following clauses: "I appoint as tutors of my children, of which five are minors yet, my brother-in-law Michel Musson, and my son-in-law Edmond Cramer, and also as executors of my last will, asking them to take for their counsellor and legal adviser, Judge J. N. Lea, allowing each of these three persons, a commission of two per cent. on the proceeds of my individual property. If any of them should decline to act as executor or tutor, the accepting ones may choose another one. I make it incumbent and obligatory upon my executors to realize the whole of my real estate in the city and country, whenever and as soon as it can be done at anything like a fair price. \* \* \* \* The whole amount realized after deduction of the expenses and commissions and the legacies mentioned hereafter, shall, like the portion coming to my children from their mother, be equally divided among the surviving children. \* \* \* \* If Judge Lea should decline or is prevented from becoming my executor, I wish that Charles Andrew Johnson may take his place."

In the codicil to the will there is the following clause: "I nominate and appoint the tutors of my children, Mr. Edmond Cramer and Mr. Michel Musson and in conjunction with them, Judge J. N. Lea, the executors of this my last will, having all confidence in any and all of them that they will do justice to my widow and children."

A fair interpretation of the clauses of the will cited, is that the executors named by the testator shall receive as compensation for their services, two per cent. commissions each on the entire mass of the property or its proceeds. This was the undoubted intention of the testator. But the heirs who oppose these items of the executors' accounts contend, as the rate of compensation is a per cent. on the whole estate, therefore, the executors are heirs by universal title; and as such, they are each bound for his share of the debts. Of course the heirs by universal title can only take the property remaining after payment of the debts; and in case they accept the succession unconditionally, they become bound each for his virile share of the debts of the deceased. But because the testator has fixed in the will the commissions of his executors at a different rate from that fixed by law, shall we say that they thereby became his universal legatees or heirs by universal title, and are bound, therefore, to contribute to the payment of the debts?

Will it for a moment be contended, that the interest of these executors in the estate would be enhanced by the death of the other heirs, or by the lapse of the special legacies from the incapacity of such legatees to take, or from any cause? Surely not. The death of all the heirs, the forced heirs, named in the will, if occurring prior to the death

of the testator, would not inure to the advantage of the executors or increase their interest in the estate.

The percentage allowed by the testator to the executor, was not an unconditional legacy to them. They were to receive it only after accepting the appointment and discharging the duties of the office. It was merely a remuneration for the services of these executors to be performed after the death of the testator. Now, whether the rate of compensation for these services was fixed in the will, or supplied by the law as part thereof, is of no consequence. In neither case would it constitute the testamentary executors the universal legatees or legatees by universal title.

If the lapse of the special legacies, or the death of the co-heirs prior to the death of the testator, would not inure to the advantage of the executors or increase their interest in the estate, they certainly are not the universal legatees.

A bare glance at the will, will show who are the universal legatees of the testator.

It says: "The whole amount realized after deduction of the expense and commissions and the legacies hereafter mentioned, shall, like the portion coming to my children from their mother, be equally divided among the surviving children," etc. \* \* \* \* \*

The children of the testator are undoubtedly his universal legatees; and the lapse of the special legacies from any cause, would inure to their advantage and not to the benefit of the executors. The conclusion is, therefore, inevitable, that the executors are not the universal legatees, and are not bound to contribute to the payment of the debts of the testator. It was not the intention of the testator that they should have the commissions mentioned in the will only on the residue of the estate after the payment of all the debts. In case the debts were equal to the entire proceeds of the estate, under the theory of the opponents, the executors would get no compensation, notwithstanding the services performed, and notwithstanding their large responsibilities in administering the estate inventoried at \$535,514 64. The greater the embarrassment of the estate, the greater the responsibilities of those administering it. And the interpretation sought to be placed on the will by the heirs, is a manifest legal absurdity. The commissions charged in the account and homologated by the court, notwithstanding the objections set up in the opposition of the heirs, we think the executors are entitled to have under the will.

As to the objection that the executors should not have commissions on that part of the property administered by them in the parish of Assumption, because the plantation has not been sold as was contemplated by the dispositions of the will, we will remark that it is made with bad grace by the heirs, who have caused it to be postponed by

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Succession of Kock.

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the advice of a family meeting advising that said property be not sold, but that the said plantation be cultivated for the benefit of the heirs. After preventing the executors from selling this part of the property according to the directions of the will, the heirs ought not to be heard to complain because the executors demand their commissions on its appraised value, which is presumed to be equal to the proceeds thereof if sold.

There are other objections which it is unnecessary to examine, because the view we have taken of the leading question presented disposes of the case.

As we are bound to give effect to the dispositions of the will, not prohibited by law, it is useless for the heirs to appeal to the sympathies of the court.

Judgment affirmed.

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No. 3856.—JAS. BREWER et als. v. A. M. KELLY, Administratrix, et als.

An action by judgment creditors to annul a mortgage given by the judgment debtor on the ground that it is fraudulent and was given by the judgment debtor in fraud of their rights, is prescribed by one year. Revised Civil Code 1978.

**A**PPEAL from the Seventh District Court, parish of Orleans. *Collens, J. Miles Taylor, J. S. Whitaker and J. Caldwell Pierce*, for plaintiffs and appellants. *Lea, Finney & Miller, Clarke, Bayne & Renshaw and Race, Foster & E. T. Merrick*, for defendants and appellees.

**TALIAFERRO, J.** This is an action by several judgment creditors of A. D. Kelly & Co., and A. D. Kelly and G. A. D. Kemper, *in solidò*, to annul and set aside an act of mortgage executed by the late A. D. Kelly in favor of J. C. Patrick, to secure an indebtedness of eighty-nine thousand six hundred dollars. This act of mortgage, the plaintiffs aver, was executed in order to give an undue preference to other creditors of Kelly & Co., and in fraud of the rights of the plaintiffs and to their injury, the said Kelly being at the time insolvent and without means to discharge all his debts and liabilities.

The representatives of A. D. Kelly and J. C. Patrick with various persons designated as the preferred creditors, were made parties defendants. The defense is placed mainly on two exceptions pleaded in bar of the action—*res judicata* and the prescription of one year. There was judgment in the lower court in favor of the defendants and the plaintiffs have appealed.

It is contended by the plaintiffs that the facts presented by this case require that articles 2221 and 1978 of the Revised Code, should be construed together to determine the question of prescription. They allege that they discovered the fraud only in May 1870, and that, by the suits brought on many of the mortgage notes given by Kelly to

Patrick, by the holders of these notes, whose names had been previously concealed. That in such a case the prescription of one year is not applicable, prescription commencing to run in cases of error or deception from the day on which either was discovered. The plaintiffs show that they commenced this action within one year from May, 1870.

Articles 2221 and 1978 Revised Code both treat of rescission of contracts. But article 1978 and the succeeding articles of paragraph two of section six, have a special application to contracts made in fraud of the rights of creditors. The first clause of article 2221 clearly points out that the article 1978 and those that follow to 1994 inclusive, form an exception to the provisions of section 7, commencing with article 2221, and which treats "of the action of nullity or of rescission of contracts." That section commences by declaring that "in all cases in which the action of nullity or of rescission of an agreement is not limited to a shorter period by particular law, that action may be brought within ten years." But in cases of rescission of contracts made in fraud of the rights of creditors, the action is limited to a shorter period than ten years; it is limited to one year. Therefore, the provisions of section seven, treating of the action of nullity, etc., are not intended to be applied where creditors institute actions to annul contracts made in fraud of their rights. The article 2221 and those of the same section would seem intended to apply in the main, to causes for rescission that arise between the parties to the contract. Hence a longer term is allowed within which the action may be brought than where third persons are permitted to annul contracts to which they are strangers; for this right is accorded only where the complaining party has suffered injury by the fraud of his debtor, and he is limited to one year to commence his action. There is not in this respect, conceded to him so great a power as that granted to the parties themselves, and in its exercise he must comply strictly with the law. A creditor complaining that his debtor has made a fraudulent contract by which he has disposed of his property or given to others an undue preference over it to the injury of his creditors, seems not to have any good reason why he should be allowed ten years within which to bring his action to annul. The fraudulent transfer or incumbrance made by his debtor can not affect him unless made a matter of record. The creditor can not reasonably assert that the act has been concealed from him or that his debtor has kept him in ignorance of it, when it has been placed upon the public records. The creditors in the present case obtained judgments against their debtor and had them recorded within a few months after he executed the mortgage to Patrick. That act was then duly recorded in the proper office. It informed them that all the real estate of their insolvent debtor was mortgaged to Patrick, and that the mortgage had precedence of their judicial mortgages. They knew that Patrick was

a preferred creditor, if they did not know that the act gave preference to others. They chose to remain passive until December, 1869, four years after the mortgage to Patrick had been recorded, and then attacked it as a simulation. It was declared not to be a mere simulation as they alleged. They now sue to annul it as an actual though fraudulent contract, and allege that not until May, 1870, did they discover the fraud, and that by finding out that Kelly, Tackett & Ford, the Wallaces and Gordon, had possession of most of the mortgaged notes and had instituted suits upon them. They now set up that under the article 2221 construed with article 1978 prescription would begin to run only from the time they discovered the names of the preferred creditors.

We think differently, and conclude that the prescription of one year under article 1978 Revised Code, pleaded by defendants, bars their action. It becomes unnecessary for us to consider the plea of *res judicata*.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

No. 3738.—MRS. M. P. L. EVANS et als. v. MRS. M. A. H. G. DE L'ISLE et al.

A motion to set default aside on the ground that the wife was not legally authorized to sue will not be maintained, if it appears from the record that the husband joined his wife as co-plaintiff; nor is a peremptory exception that the notes sued upon belonged to the community, a good defense to the action brought by the wife to recover thereon, if in this action the husband has joined the wife in the suit as co-plaintiff.

**A**PPEAL from the Seventh District Court, parish of West Feliciana. *Miller, J. Wickliffe & Fisher*, for plaintiffs and appellees. *Collins & Leake*, for defendants and appellants.

HOWE, J. This action was instituted on two mortgage notes, for \$1250 each. Judgment by default was rendered, when defendants moved to set the default aside on the ground that the plaintiff, Mrs. Evans, was not legally authorized to sue. The motion was overruled, and the defendants filed an answer. The cause was tried and judgment rendered for plaintiffs as prayed for and defendants appealed.

We do not perceive that the court erred in overruling this motion, as Wm. R. Evans, the husband, joins the wife as co-plaintiff. 4 N. S. 388. And as, to remove all possible objection, the plaintiff, Mrs. Evans, was authorized by the judge, and a special authorization of her husband, filed in the suit before the trial on the merits, we are somewhat at a loss to know for what valid reason the point is still pressed. 10 An. 504.

The point that the judge below improperly refused a continuance, seems to be abandoned.

Mrs. M. P. L. Evans et als. v. Mrs. M. A. H. G. De L'Isle et al.

The answer averring ownership of the notes to be in one Mrs. Perkins, was not only not proved but was disproved; and next, under the banner of a peremptory exception the defendants contended that the notes belonged to the community existing between Mr. and Mrs. Evans, and that Mrs. Evans could not therefore sue. It is by no means clear that the notes were community. We incline to the opinion that they were paraphernal. But conceding them to have been community, the husband joins in and authorizes this suit; the defendants allege no defense against him of which this form of action can deprive them; and he is concluded from ever making any other demand on the notes. *Lapice v. Lapice*, 21 An. 226.

And finally in this court the defendants allege that the judgment has been sold to the firm of M. Hiller & Co. for \$2000, that this is a sale of a litigious right, and they ask "that they may be permitted to pay and satisfy the judgment at \$2000." There is no evidence offered of this allegation except a certified copy of a transfer of the judgment, and in this there is no price named. But even if there had been a sale *pendente lite*, it behooved the defendants, if they wished to avail themselves of the advantages of the law in this regard to do so by paying the vendees the purchase price, and not to protract the litigation, as they have done by persisting in defenses more remarkable for ingenuity than merit. 4 An. 104; 22 An. 338.

The appellees pray for damages. It is therefore ordered that the judgment appealed from be affirmed with one hundred and twenty-five dollars damages and costs.

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No. 3829.—AMARON LEDOUX v. HYACINTHE MORGAN et als.—Third opposition of J. P. HARRISON.

In a contest between mortgage creditors over the proceeds realized from the sale of mortgaged property, the mortgage creditor holding the superior mortgage is entitled to be first paid, whether the obligation for which his mortgage was given has matured or not.

**A**PPPEAL from the Seventh Judicial District Court, parish of Pointe Coupée. Posey, J. Edward Phillips, for plaintiff. Farrar & Montgomery, for opponent and appellant.

WYLY, J. This is a contest between the creditors of the defendant, Mrs. Morgan, for the proceeds of her property, sold under the *fi. fa.* issued in the judgment of the plaintiff against the defendants.

Two oppositions were filed; one by J. P. Harrison, claiming the proceeds by virtue of the alleged priority of his judgment, and the other by James Vignes and others, who claim priority by virtue of their conventional mortgage, which has been rendered executory in the judgment which they hold against the defendant Mrs. Morgan.

The court gave judgment recognizing the superiority of Harrison's mortgage, and ordering the proceeds in dispute to be applied to the payment thereof. From this judgment the plaintiff, who was the seizing creditor, and the third opponents, James Vignes et als., have appealed. The conventional mortgage, granted in favor of James Vignes et als. is superior in rank to both the other mortgages; and it has been rendered executory in the judgment obtained by said mortgages against the defendant Mrs. Morgan. This conventional mortgage was given to Vignes et als. in order to secure them or to indemnify them from any liability or loss they might sustain from having signed as securities the notes given by the defendant Mrs. Morgan to the plaintiff, being the same on which the judgment sought to be enforced was based.

The opponent Harrison, concedes that the conventional mortgage in favor of these securities, Vignes et als., is superior in rank to his; nor does he contest the validity thereof; but he insists that as it is not alleged nor shown that they have yet suffered any loss by reason of their securityship their mortgage is inoperative and the proceeds in dispute should be given to him or be applied to the satisfaction of his judgment.

The judgment under which the proceeds in dispute were derived is a judgment *in solido* against Mrs. Morgan and her securities Vignes and others. They have been held liable as securities for Mrs. Morgan. Now whether their mortgage was prematurely foreclosed or not, on the ground that they had not at the time of the foreclosure suffered the loss contemplated in the mortgage, is of no consequence. The mortgage has a legal cause; it is valid and obligatory and is prior in rank to that of the third opponent J. P. Harrison. Whether it was due and exigible at the time of its foreclosure or not, does not concern the said opponent. Assume, for argument, that it is a conditional conventional obligation, secured by mortgage, and that the condition has not yet happened. It is a mortgage, nevertheless, superior in rank to that of Harrison; it attaches to the property and can not be removed by the execution of the judgment of a junior mortgage creditor.

But it has been decided that the debt secured by the conventional mortgage is due and exigible; and although that judgment is not binding on the third opponent Harrison, because he was not a party, he can not attack it collaterally. He might have brought a direct action to set it aside if it stands in his way or if its annulment for prematurity would benefit him. But this has not been done; and as before remarked the mortgage is superior in rank to his, whether exigible or not at the time it was foreclosed. A mortgage secures an immature obligation as effectually as a mature one. The only question between creditors in a contest like this, is as to the rank of their respective



mortgages; and here we find the rank of the mortgage set up by Vignes and others superior to that of Harrison, and also to that of Ledoux.

The funds realized from the sale of the common debtor's property, Mrs. Morgan, should, therefore, be applied to the satisfaction of the judgment set up by James Vignes et al., which amounts to more than the proceeds in the hands of the sheriff.

It is therefore ordered that the judgment appealed from be annulled; that the opposition of J. P. Harrison be rejected with costs, and that the opposition of Vignes and others be maintained, and that the funds in controversy be applied to the satisfaction of their judgment. It is further ordered that appellee pay costs of appeal.

#### No. 2254.—JOHN P. WALWORTH v. JOHN C. STEVENSON.

A judgment that has been rendered without legal citation is absolutely void, and any person having the least interest therein, may show such nullity wherever and whenever it is sought to be enforced.

In attachment proceedings the forms of citation prescribed by the law maker must be strictly observed under penalty of nullity.

A purchaser under a judicial sale is in bad faith, and is liable for rents and damages, if the judgment under which he purchases is absolutely void for want of citation.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Roselius & Phillips* for plaintiff and appellant. *Miller & Huntington and Fellows & Mills*, for defendant and appellee.

LUDELING, C. J. William Wren, a tenant of John P. Walworth, having caused certain improvements to be made on the premises for his own account, by John Page, gave said Page his note for the balance due by him, \$418 65.

On the eleventh of December, 1862, Page proceeded against Wren and Walworth, by attachment, and caused the property of Walworth which had been leased to Wren to be seized under the writ of attachment. On the eleventh of February, 1863, judgment was rendered against both defendants, *in solido*, with privilege upon the property attached. In execution of this judgment the sheriff sold the property to one George Hawes, who sold it to Wilson, he sold it to Seiler, and Seiler sold it to the defendant.

On the fourteenth of April, 1866, Walworth and Wren instituted suit against John Page to have the judgment rendered against them in 1863, and by virtue whereof the property in question had been sold by the sheriff, declared a nullity, on the ground that they had not been cited.

A decree was rendered in that case, declaring the judgment in the case of John Page v. John P. Walworth et al. null and void, for want of citation.

94	251
46	888
46	1888
24	251
105	485
24	251
116	889

Thereupon the plaintiff instituted the present suit against John C. Stevenson, who possesses as owner, to recover the property which had been seized and sold under the judgment, in the case of John Page v. Walworth et al. He alleges the absolute nullity of the judgment for want of citation; he invokes the benefit of the decree declaring the judgment null, and he asserts title to the property by virtue of a purchase made on the first of April, 1853, by notarial act duly recorded.

It is not necessary to decide what is the effect of the decree in the suit by Walworth and Wren against Page, declaring the nullity of the judgment in the case of John Page v. John P. Walworth et al., as to persons not parties to that suit, for the pleadings and the evidence in this suit will enable us to examine the validity of that judgment.

The proceeding was by attachment against John P. Walworth and William Wren, both absent from the State, and they do not appear to have been cited. Citations addressed to Mrs. John P. Walworth et al., were posted at the doors of the court house and the church, and one was served upon a curator *ad hoc*, but no citation was addressed to John P. Walworth or William Wren.

The district judge who had the original citations before him says: "It appears that the judgment under which the above *fieri facias* was issued was a radical nullity; no citation such as the law requires having been served upon the defendant; and it is conceded that the proceedings which resulted in the judgment against John P. Walworth and Wren, in No. 19,232, are absolutely null and void, as there is no legal citation in the case." The same fact was found by the judge who tried the suit of Walworth and Wren v. Page, for the nullity of the judgment against them.

Articles 179 and 254 of the Code of Practice prescribe how the defendants in the attachment suit should have been cited. It is well settled that the forms of law required in cases of attachment against absentees or non residents, are to be strictly pursued; and that when the law designates, in lieu of personal citation, certain notices or publications in derogation of the common right to be heard before condemnation, courts of justice will require a strict compliance with the peculiar forms indicated by the law maker. 1 N. S. 9; 8 N. S. 145; 6 La. 577; 13 An. 150; 2 An. 403.

The defendant contends that purchasers at sheriff's sales can not be required to go behind a judgment; and that if a judgment and a writ of *fieri facias* be shown, and the proceedings under the writ be regular, the purchaser will be protected.

The error he commits is in supposing there can be a judgment when the defendant has neither been cited nor appeared to defend the suit.

In Bernard v. Vignaud, Judge Porter said: "In every judgment the agency and presence of these parties are required; *judex, actor et reus*.

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Walworth v. Stevenson.

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To condemn without first hearing a defendant or giving him an opportunity to be heard, is contrary to all principles of equity and law. Therefore, a judgment rendered against a person without citing him in the ordinary manner, without his appearing, or anything deemed by law equivalent to citation or appearance, is utterly void, and imparts such absolute nullity that any one the least interested in opposing its effects may have such nullity pronounced." 1 N. S. 9.

The broad and well recognized distinction, that judgments absolutely null have no existence in law, while those only relatively null have an existence until they are set aside, seems to have been ignored by the learned judge *a quo*. C. C. art. 12; 1 N. S. 1; 6 La. 377; 11 R. 121; *Baldwin v. Carlton*, 6 An. 265; *Uzee v. Biron*, 2 An. 492; *Galbraith v. Snyder*, et al.

The defendant's title is without foundation, as it rests upon a judgment which has no legal existence, and which, therefore, can not be the source of any legal right or obligation. 6 R. 205; *Lowery, curator v. Erwin*, 2 An. 569; *Broughton v. King*, 2 An. 503; *Gibson v. Foster*, 5 An. 633; *Adel v. Auty*, 13 An. 431.

Not being a possessor in good faith, the defendants owe rents. 6 R. *Lowery v. Erwin*, 192; *Bry v. Fouché*, 11 An. 665.

The evidence shows that the use of the property from the twenty-eighth of November, 1864, to the eleventh of February, 1869, was worth at least fifty dollars per month, for which there should be judgment in favor of the plaintiff. C. C. 2427. It is also proved that the defendant has paid fourteen hundred and forty-two dollars for work and repairs necessary for the preservation of the property, and for taxes. This he is entitled to be reimbursed by the plaintiff. It is further proved that he paid to William W. Wilson and John Seiler \$4000 for the property, and \$40 broker's bill, and \$16 50 notary's bill, expenses of the sale, and that he has incurred a liability of five hundred dollars for attorney's fee for defending this suit. These sums the defendant is entitled to recover from his vendors and warrantors. C. C. 2482, 1960. William W. Wilson and John Seiler called their vendor in warranty, but there was no issue joined between them.

It is therefore ordered and adjudged that the judgment of the lower court be annulled, and that there be judgment in favor of plaintiff against the defendant, recognizing the plaintiff as the owner of the property described in the petition, and ordering that the defendant be put in possession thereof. It is further ordered that the plaintiff have and recover judgment against the defendant for twenty-five hundred and twenty-one dollars and fifty-eight cents, as rents, with five per centum per annum interest thereon from this date, and costs of suit; subject to a credit of fourteen hundred and forty-two dollars and fifteen cents.

Walworth v. Stevenson.

It is further ordered and adjudged that the defendant recover against his warrantors, William W. Wilson, and John Seiler, the sum of four thousand five hundred and fifty-six dollars and fifty-one cents, with five per centum per annum interest thereon from this date, and the costs of this suit.

It is further ordered and adjudged that the rights of William W. Wilson and John Seiler against their vendor and warrantor be reserved to them.

Rehearing refused.

HOWELL, J., *dissenting*. In my opinion the citation, brought in question in this controversy, is in legal form as to the plaintiff. It possesses all the requirements of the law, and I do not think the action of the clerk in prefixing the letters or characters "Mrs." can render that citation void. These characters at most are conventional, and can not properly be considered as controlling the names of parties. A citation good in form in an ordinary action is good in an attachment suit.

The purchaser is required to look only to the existence of a judgment by a competent court, the writ of execution and the sale.

I therefore think the sale should not be set aside.

Mr. Justice Wyly concurs in this opinion.

#### No. 3840.—JOSEPH HEWITT, JR. v. GEORGE S. ROUDEBUSH.

A person who has contracted with another to run a gin, can not recover damages from his employer who has discharged him before the contract expired, for just cause, such as a failure to discharge his duties properly.

An agent who contracts without authority from his principal binds himself.

**A**PPEAL from the Thirteenth Judicial District Court, parish of Tensas. *Hough J. Mayo & Spencer*, for plaintiff and appellee. *T. P. Farrar*, for defendant and appellant.

WYLY, J. The plaintiff sues for the reimbursement of moneys expended by him, as agent of the defendant, in running a gin in the parish of Tensas, during the months of October, November, December and January, of 1870 and 1871. He also claims \$555 33 $\frac{1}{4}$  damages for the violation of the contract by the defendant in discharging him.

The court gave judgment for \$354 48, and decreed that the property attached be sold to pay the amount. The defendant appeals, and the plaintiff prays that the judgment be increased to the full amount claimed.

From the evidence we are satisfied that the defendant had sufficient cause to discharge the plaintiff. He was not taking proper care of the

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Hewitt, Jr., v. Rondebush.

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machinery, and he was not acting for his employer as a prudent and faithful agent should. Hence there is no foundation for the claim of damages.

From the evidence we are satisfied the district judge did not err in giving judgment for the plaintiff for \$354 48. That much of the account we think correct. There are many items embraced in the account that were not necessary, and for which the agent and employe had no right to charge his principal as expenses for running the gin.

As to the defense that the defendant should not be held liable because he only contracted with the plaintiff as agent, we will remark, there is no force in it. He fails to show he had authority from Oakland College to make the contract with the plaintiff. It is well settled that an agent contracting without authority binds himself.

Judgment affirmed.

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No. 3795.—S. M. CHASE v. C. G. HALE.

During the late war parties residing on opposite sides of the lines of military occupation were prohibited from having any business transactions, or of contracting with each other. But if two parties contracted who both resided within the federal military occupation at the time, although residing in different localities, the contract was legal and binding on the parties.

**A**PPEAL from the Seventh Judicial District Court, parish of Pointe Coupée. *Miller, J. Edward Phillips*, for plaintiff and appellee. *Haralson & Claiborne*, for defendant and appellant.

WYLY, J. The defendant appeals from the judgment against him on a note or due bill for \$1618 50.

The defense is, the contract is void because at the time it was made, in September, 1864, the defendant was a citizen of the parish of Pointe Coupée and the plaintiff was a citizen of New Orleans, and under the act of Congress and the proclamation of the President all intercourse between them was prohibited. It is admitted that the plaintiff resided in New Orleans and the defendant in the parish of Pointe Coupée at the time the note sued on was given. But the national forces were then occupying a portion of the parish of Pointe Coupée.

The residence of the defendant was on the river, a few miles below Morganza, where the troops were stationed. It is fair to presume, and indeed the evidence satisfies us, that federal authority prevailed over the plantations in the immediate neighborhood, and that the residence of defendant was not in rebel lines. It also appears that the due bill was given in settlement of a partnership between the plaintiff and the defendant for buying and selling cotton, which was carried on under permits issued by competent authority.

Judgment affirmed.

No. 3792.—E. T. MERRICK v. ROBERT MCCAUSLAND—On rule against JESSIE B. SIMS et als.

A judicial mortgage creditor of inferior rank to that of a conventional mortgage creditor may proceed by rule against the latter to show cause why his conventional mortgage should not be erased, without proceeding by direct action to set aside the conventional mortgage, and the conventional mortgage creditor must plead to the rule, and not except to the judicial mortgage creditor proceeding in that form to get rid of the mortgage.

**A**PPEAL from the Seventh Judicial District Court, parish of West Feliciana. *Cooley, J. Samuel J. Powell*, for plaintiff and appellant. *Dirhammer & Kennard*, for defendant and appellee.

Howe, J. The plaintiff claims to be a judicial mortgagee of the defendant by registry of June 16, 1866. Jessie B. Sims and others claim a conventional mortgage, recorded October 19, 1865.

The plaintiff having caused the land to be seized for sale, and being embarrassed by the presence of this prior conventional mortgage took a rule on Sims and others and the recorder of mortgages, to show cause why it should not be erased, on the ground that it was a mere pretense, without any real consideration, or if given for any consideration, made for notes of the so-called Confederate States.

A portion of the defendants in rule excepted that the plaintiff could not proceed in this summary way, but must bring a direct action, and their exception being sustained and the rule dismissed, the plaintiff has appealed.

We think the court *a qua* erred. It seems to be settled that "where the property of one, against whom judgment has been rendered, appears to be subject to privileges or mortgages, entitled to a preference over the judgment creditor, the latter may, by rule to show cause, as incidental to the proceedings had for the purpose of selling the property, call upon those claiming such privileges, or mortgages, to show cause why they should not be erased. The seizing creditor can not be required to resort to a direct action against such persons holding such privileges or mortgages." 1 An. 333.

It is true that in *Bank v. Delery*, 2 An. 650, it was held that the litigation concerning all such privileges and mortgages was not to be cumulated with the rule, and the apparent prior incumbrancer deprived of a jury; but it was still held that he was bound to plead, the court having power to compel him to litigate or else to have erased from the records an incumbrance which he was refusing to execute and which might be kept on the records for purposes of collusion and fraud.

It seems then that in this case the defendants in rule should plead and not except. Whether their answer when filed will prove to be one which under the decision in *Delery's* case will justify the lower judge in declining to pass upon the rule until the reality and validity of their

mortgage shall have been elsewhere decided is a matter in regard to which we are not called upon to prophesy or adjudicate.

Let the judgment be reversed, the exception dismissed, and the cause remanded for further proceedings, at the costs of appellee.

Wyly, J., concurring.

HOWELL, J., *dissenting*. I can not concur in the opinion or conclusion of the majority of the court in this case.

The appellant is seeking to get rid of a mortgage which ranks his, and the ground on which he relies is thus stated: "That said pretended mortgage was given without any real consideration; or, if a supposed consideration, the same was for the unlawful notes or currency of the so-called Confederate States." Now it seems perfectly clear to me that this is "a cause of action," which can only be presented to a court by petition and citation. The consideration, the validity and legality of the adversary's rights are, on the face of the rule, brought in question, and the latter has a right by all the rules of litigation, to have the issues made and tried in the regular form of action and to demand a jury if he wishes.

The question is asked, could the appellant, having the property under seizure or execution, and holding a junior mortgage on this property compel the owners of the senior mortgage, *by rule*, to show cause why their mortgage should not be erased? Whether or not there may be cases where this could be done need not here be decided; but this is not such a case, for here the merits of the debt and mortgage are involved and should be ascertained in a regular suit. I know of no law which authorizes the proceeding by rule in a case like this, and it is settled that summary proceedings can not be extended beyond the cases expressly authorized by law. See C. P. 98, 170, 754, 756; 3 An. 434; 12 An. 182, 201, 799; 17 An. 317.

In the section of the R. C. C., upon the erasure of mortgages, it is declared that the inscription of mortgages may be erased by virtue of a judgment ordering such erasure; but, excepting as between parties to a pending suit, it is clearly indicated that there is a right of action existing to compel the creditor in case of refusal to grant the erasure, and that this creditor must be cited.

Why say the defendants in rule must plead and allege a real defense, before they can be heard to object to the form of proceeding, when the issue is tendered in the rule, and a general denial, if it were a petition, would put the plaintiff upon the proof of his allegations? The very act of excepting is evidence that the defendants wish to avail themselves of any defense they may have, if plaintiff persists in his demand. The exception to the form of action is one which must be pleaded *in limine*, and may be waived by pleading to the merits. A

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Merrick v. McCauland.

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simple allegation that he has a defense added to the exception can have little weight.

The appellant's case is simply this: He holds a second mortgage on certain lands, which will not sell under his execution, after several trials, for sufficient to cover the first mortgage, and he is therefore, he says, entitled to a summary proceeding to get rid of that mortgage on the allegation or ground that its consideration is not a good one in law or morals. In my opinion he must resort to the ordinary form of action to try this question.

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No. 3779.—WALMSLEY, CARVER & CO. v. GEORGE W. WHITFIELD.  
AIREY & COLTON, Intervenor.

A dismissal, on motion of the defendant, of the main action necessarily carries with it the dismissal of the intervention filed in the case.

**A**PPEAL from the Ninth Judicial District Court, parish of Natchitoches. *Lewis, J. William Jack*, for defendant and appellee. *H. Safford*, for intervenors and appellants.

HOWE, J. This suit was instituted in 1861 upon a claim against defendant, Whitfield, for plantation supplies and money loaned, and certain cotton was sequestered. Airey & Colton intervened, claiming the amount of a debt due them from defendant, of which a part was alleged to bear privilege on the same cotton, and demanding also a judgment against the plaintiffs and the sheriff for the value of the sequestered cotton which they alleged had been unlawfully taken from the possession of the warehousemen who held it for intervenors.

Plaintiffs answered the intervention, denying the claims of intervenors and their right to intermeddle with the plaintiffs in their pursuit of the defendant.

In 1866 the defendant answered plaintiffs' petition. In 1871 defendant answered the petition of intervenors. At the November term of that year the plaintiffs not appearing to prosecute their suit, the defendant caused them to be called in open court and their "suit dismissed without prejudice to the rights of the intervenors, and that the intervention be dismissed as in case of nonsuit."

The intervenors appeal, and claim that while the defendant had a right to dismiss the plaintiffs' suit against himself, he had no right to have the intervention dismissed at the same time, and cites 7 Rob. 10, and 11 Rob. 314.

The defendant, appellee, contends that with the dismissal of the principal suit intervention necessarily fell to the ground, and cites 3 An. 331; 4 An. 279; 9 An. 54; 14 An. 426.

We are of opinion that the views maintained by appellee are correct. Judgment affirmed.



## No. 3826.—JOHN G. SCOTT v. JOHN F. GOODRICH.

The signature of the judge to the minutes of the court is only his attestation of their correctness, and can not be regarded as his signature to a final judgment.

An appeal taken from a judgment attested in this way will be dismissed on motion because it is not signed by the judge.

**A**PPEAL from the Thirteenth Judicial District Court, parish of Tensas. *Hough, J. Aroni & Lewis*, for plaintiff and appellee. *Farrar & Reeves*, for defendant and appellant.

**TALIAFERRO, J.** There is a motion to dismiss this appeal on the ground that there was no final judgment rendered in the court below from which an appeal can be taken, and no judgment appearing in the record dismissing plaintiff's action.

The order sustaining the exception to the jurisdiction of the court and dismissing the action is followed by an order of appeal granted on motion in open court on the part of the plaintiff, to which is immediately subjoined, after the words "minutes signed," the official signature of the judge. We think the signature of the judge was appended merely as attesting the correctness of the minutes of the court, and is not to be regarded as his signature to a final judgment. The motion must therefore prevail, and it is accordingly ordered that the appeal be dismissed at costs of appellant.

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No. 3720.—ALEXANDER G. COMPTON et als. v. MICHAEL LEGRAS, Tax Collector.

In a civil case in which the parties are entitled to a jury, if the jury has not been drawn in accordance with law, the verdict will be set aside on appeal, and the cause will be remanded to be tried *de novo*.

**A**PPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. T. O. Manning*, for plaintiff and appellant. *E. A. Hunter*, for defendant and appellee.

**LUDELING, C. J.** The plaintiffs enjoined the sheriff from selling their property to pay taxes, on the grounds set forth in the case of *Clara H. Flower v. Michael Legras*, tax collector, just decided.

In this case, however, the plaintiffs prayed for a trial by jury, which was allowed. When the jury was about to be drawn, the plaintiffs objected to the jurors being sworn, and excepted to the whole panel, because not drawn in accordance with law, as they had been drawn from only a *portion* of the voters, whereas they should have been drawn from *all* the voters. This exception was overruled; and we are required to pass upon it. The evidence shows that the jury, in this case, was drawn from a box, which contained only a remnant of the names of the voters, who had been selected as jurors in 1870, after

three panels had been drawn therefrom for previous terms of the court. The act of 1868 declares that "thirty days before the sitting of each jury term of the District Court of the several parishes (the parish of Orleans excepted), the sheriff, parish judge, and the clerk of the district court, together with two qualified electors to be summoned by the said parish judge, shall meet in the court house of their respective parishes, and select from the list of registered voters the names of every qualified elector on the same," \* \* \* "not exempt by law from jury duty, and shall make a list of the same, to be filed in the office of the clerk of the district court. The aforesaid officers and qualified electors shall cause to be written on separate ballots of paper of uniform size, the name of each person so selected and placed upon the list, which ballots shall be deposited in a box to be provided for the purpose, and after being well mixed, one of said officers, under the direction of the others and of the two qualified electors present, shall draw therefrom not less than forty-eight ballots, and a larger number if ordered by the district judge, and the clerk of the district court shall, as each name is drawn, enter it upon a list for record, and deposit the ballot so drawn in a separate box, etc. The list of jurors so drawn for each term shall be filed in the clerk's office as soon as completed," etc., and "the persons thus drawn shall be summoned by the sheriff to serve as jurors at the next ensuing term of the court," etc. R. Statutes, 422.

The jury in this case was not drawn in the manner indicated by the foregoing law, and the objections should have been sustained. The plaintiffs being entitled to a trial by jury, the cause must be remanded for that purpose.

It is therefore ordered and adjudged that the judgment of the district court be set aside, and that the case be remanded to the court *a qua*, to be tried *de novo*. It is further ordered that the appellee pay costs of appeal.

No. 3503.—P. O. PEYROUX v. MRS. INES DEBLANC.

An action to annul a judgment on the ground of fraud, must be brought within one year from its discovery, otherwise it will not be maintained.

**A**PPPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. Charvet & Duplantier*, for plaintiff and appellee. *Charles Louque*, for defendant and appellant.

**WYLY, J.** The plaintiff sues to annul the judgment obtained by the defendant against him on the fourteenth April, 1869, on the ground that said judgment was obtained fraudulently and upon false evidence. The court gave judgment for the plaintiff and the defendant appeals.

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Peyroux v. Mrs. Ines DeBlanc.

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Several defenses are urged; but the most effectual one is, the prescription announced in article 613, Code of Practice, which limits the action of nullity for fraud to the period of one year after the fraud has been discovered. The judgment was signed on the nineteenth April, 1869.

Notice of the *fi. fa.* issued on said judgment was served on the plaintiff, P. O. Peyroux, in person, on the twenty-ninth May, 1869. He certainly had notice of the judgment and of the fraud, if such there was, on the ninth November, 1869, when he applied for rehearing, the judgment being then signed since nineteenth April, 1869.

This suit was not filed till the thirtieth December, 1870. More than one year from the discovery of the fraud, if any, had, therefore, elapsed before this action of nullity was instituted.

It is therefore ordered that the judgment appealed from be annulled, and that plaintiff's demand be rejected with costs of both courts.

Rehearing refused.

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No. 3343.—HENRY VON PHUL, JR., and WM. VON PHUL v. THE CITY OF NEW ORLEANS.

A commercial firm that has been dissolved and its dissolution has been duly published, can not afterward be legally assessed to pay licenses or taxes. Nor can the city or State who has made such assessment recover the taxes assessed on the ground that it was made the duty of such firm to examine and cause to be corrected the assessment roll within a given time. In such a case the doctrine of acquiescence does not apply. If judgment has been rendered against a firm for taxes assessed after the firm has been dissolved, then and in such case, the firm has the right to sue for the nullity of such judgment.

**A**PPEAL from the Seventh District Court, parish of Orleans. *Collens, J. McGloin & Kleinpeter*, for plaintiffs and appellees. *George S. Lacey*, City Attorney, for appellant.

**Howe, J.** The plaintiffs were formerly engaged in business as merchants in New Orleans, being partners of the commercial firm "H. Von Phul, Jr. & Co.," but in the month of February, 1868, the firm was dissolved, the dissolution publicly advertised, and one of the partners, Henry Von Phul, went to reside in the parish of East Baton Rouge.

In the year 1869, notwithstanding the fact that the firm had ceased to exist a year previously, it was assessed by the city of New Orleans as having a capital of \$30,000, and a tax imposed on it of \$712 50. In 1870, the name of the late firm was advertised in the list of delinquents, and on November 31, 1870, judgment was obtained in the court *a qua* in favor of the city against "H. Von Phul, Jr. & Co." for the amount of the tax. In January, 1871, this suit was instituted to annul this judgment, and having been decided in favor of plaintiffs in nullity, the city has appealed.

We can not agree with the counsel of the appellant that the rule

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Henry Von Phul, Jr., and Wm. Von Phul v. The City of New Orleans.

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laid down in the cases of *State v. S. S. Co.*, 13 An. 497, and *New Orleans v. Hall*, 21 An. 438, apply to such a case as this. In each of those cases there was a person in being at the time the assessment was made, who, it was held, was bound to watch the assessment, and have any errors corrected in the proper mode. But in this instance the juridical person on whom this tax was assessed had ceased to exist more than a year prior to the making of the assessment, and the proper notice had been given of this fact; and it would surely be carrying the doctrine of acquiescence too far to say that the persons who had composed this firm were still bound year after year, though perhaps resident elsewhere, to scrutinize the assessment roll under the penalty of being concluded by its recitals. If a tax could be saddled, in the method claimed, on a firm which had ceased to exist a year prior to its imposition, why not on one which had ceased to exist ten or fifty years before?

We are of opinion that the plaintiffs have a legal interest to annul this judgment for taxes since it might be sought to be used against them and that the court *a qua* did not err.

Judgment affirmed.

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No. 3711.—*JOHN M. CORSE v. C. F. L. STAFFORD et al.*

In seizing real estate under execution, the sheriff must take actual corporeal possession of the property seized, otherwise a petitory action to recover the same, can not be maintained by the purchaser at sheriff's sale. 22 An. 207; 23 An. 512.

**A** PPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. T. O. Manning and A. Seay*, for plaintiff and appellant. *Ryan & White*, for defendant and appellee.

**TALIAFERRO, J.** This is a petitory action to recover a tract of land and plantation of which the plaintiff avers ownership, and which he alleges the defendants hold illegal possession of, and refuse to deliver to him.

The suit is brought against a married woman and her husband. The wife answers that she holds the property under a *dation en payement* from her husband made in satisfaction of a judgment rendered against him in her favor for paraphernal rights and claims, and she called her husband in warranty. In answer to this call in warranty, the husband denies that the plaintiff ever acquired any title to the property in dispute, and proceeds to allege that the judgment and sheriff's sale set forth as the basis of this claim or title, are null and of no effect, because the suit in which the judgment was rendered was dismissed by the district court on exception, and at the time the judgment was rendered, the case was on appeal to the Supreme Court, and unless by order of that court, it could not have been reinstated on the

docket of the district court, because the alleged agreement by which the plaintiff avers the property was to be delivered up to him on defendant paying a certain debt in installments, was entirely unauthorized by him, his attorneys having entered into it without his authority. He further answers that he was never notified of the judgment, and that the sheriff never took possession of the property which he pretended to seize.

In the court below the defendants had judgment in their favor and the plaintiff prosecutes this appeal.

The plaintiff holds under title derived from Tate, who it seems bought the property in controversy at sheriff's sale provoked by himself and Dupey, as holders of two notes of J. M. Stafford, one of the defendants, given as part of the price of the property in dispute, which was specially mortgaged to secure the payment of the notes. The proceedings generally seem not to have been conducted with exactness, and especially in reference to the seizure of the property by the sheriff under the order of seizure and sale, which we can not but regard as fatally defective. It is shown that the possession of the defendants was not divested by the act of seizure either actually or constructively, and that the sheriff never had the property under his custody; the deputy sheriff who was employed to make the seizure testified on the trial of the case. Being shown the return on the back of the execution he said: "I signed this return; don't recollect whether I went on the plantation or not; we always do; we generally go on the plantation, read the writ to the parties, and give them a notice of seizure; after reading the writ and giving the notice, we come home; that is the only seizure we make, as a general thing, where it is land; I don't recollect ever taking a further possession than this in the case; I say this from the general mode of seizing land; I never remained on the land myself; I don't think John De Lacy, sheriff, did; I know he did not remain on the place; J. M. Stafford has been on that place before and after that seizure, and during the seizure. Except by instructions I never place a keeper on a place; I don't recollect that Stafford was appointed keeper. It has been so long ago I recollect very little about it. When we put a keeper on property we always state so in the returns."

Under the sheriff's sale we think the plaintiff did not acquire title because it was never taken into the possession of the sheriff, and, therefore, that he can not maintain his petitory action.

It has been frequently decided that a sheriff's sale without a valid seizure confers no title. 11 An. 761; 12 An. 275; 19 An. 58; 22 An. 207; 23 An. 512.

It is therefore ordered that the judgment of the district court be affirmed with costs.

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Hickman, Executrix, v. Thompson.

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No. 3815.—*DESIREE HICKMAN, Executrix, v. AMOS B. THOMPSON.*

A surviving widow has the right to mortgage her half of the estate of her husband after the community is dissolved by his death, and the mortgagee has the right to enforce such mortgage, although the estate has not been finally settled, and the rights of the community have not been fully ascertained. In such a case the wife who is the executor of the estate can not, in her individual capacity, maintain an injunction to stay the sale of her interest in the community thus mortgaged, on the allegation, without proof, that the estate is largely indebted for which the community is bound.

**A** PPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. M. Ryan and J. G. White*, for plaintiff and appellee. *J. R. Bowman*, for defendant and appellant.

WYLY, J. The plaintiff as executrix of the will of her late husband, Peter T. Hickman, enjoins the foreclosure of the mortgage which she in her individual capacity granted to the transferrer of the defendant on her undivided half of the community property described in the petition, alleging that said property belongs to the succession of her said husband which has never been closed; that large claims have been preferred against it, and that the mortgage which she granted is void because of vagueness in the description of the property. The answer admits that the defendant sued out the order of seizure and sale to collect the mortgage notes for \$9000 executed in 1867 by the plaintiff, in her individual capacity, on her half of the community property, and avers that the pretended administration of said property, as belonging to the succession of Peter T. Hickman, is a mere pretext to shield the property of the plaintiff from her creditors; that the plaintiff herself has long since disregarded it, she and the heirs having used it as their own. Changing the executory proceeding to an ordinary action, the defendant prays judgment for \$9000 on the notes and that the mortgage given to secure them be recognized and enforced on the property therein described. The court perpetuated the injunction and rejected the demand of the defendant and he has appealed.

We think the court erred. Mrs. Hickman, after the dissolution of the community, had the undoubted right to alleviate or mortgage her half of the property. She chose to mortgage it to secure the notes held by the defendant. She failed to pay the notes and the defendant seeks to foreclose the mortgage. Why can he not do so? Why can not a mortgage creditor make the forced sale of such property as his debtor might convey by a conventional sale? We see no reason why the interest of the plaintiff in the property mortgaged may not be sold by her creditor.

The executrix has been in office over five years and no claims seem to have been established against the succession of her husband. It is further shown that she has received \$50,000 for cotton remaining after the death of her husband. No tableau or account has ever been filed.

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Hickman, Executrix, v. Thompson.

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From the evidence we are satisfied that the defense that large claims are preferred against the succession, is a mere pretext to shield her half of the community property from the just pursuit of her creditors.

The description of the property is sufficient. Let the judgment appealed from be annulled, and let there be judgment for the defendant for nine thousand dollars with eight per cent. per annum interest thereon from the seventeenth December, 1867, and all costs, and let the mortgage be recognized and enforced on the property described in the act of mortgage, and let the same be sold according to law to pay the amount of this judgment.

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No. 2522.—M. GRIVOT v. THE LOUISIANA STATE BANK.

In this case the evidence shows that the plaintiff had moneys deposited in the Louisiana State Bank to his credit in 1862; that the plaintiff left New Orleans and went into the rebellion soon thereafter. That by a military order issued by General Banks, then in command of the military forces of the United States at New Orleans, plaintiff's moneys were seized in the hands of the bank and paid over into the hands of the quartermaster of the army. Held—That the bank having yielded to a power that it could not resist, in paying over the money of plaintiff to the military authorities, the plaintiff could not require it to make good the loss he had sustained thereby.

**A**PPEAL from the Fourth District Court, parish of Orleans. *Theard, J. M. Grivot*, in proper person, appellant. *E. Pierson*, for defendant and appellee.

**TALIAFERRO, J.** This suit is brought for an alleged balance in bank to the plaintiff's credit on the twenty-fifth of April 1862.

The answer denies the material allegations, and avers that the bank was compelled by a military order of General Banks to surrender and deliver up to the military authority of the United States all the funds and money in bank belonging to the plaintiff at the time set forth in plaintiff's petition. That at the time the said military order was issued the city of New Orleans, the domicile of defendant, was entirely controlled and governed by martial law, and the authority of the civil government of the State of Louisiana, in the city of New Orleans, wholly suspended.

There was judgment in the court *a qua* against the plaintiff rejecting his claim and he has appealed.

The plaintiff contends that the military order under which the defendant pretended to act was general in its character, and did not direct specially the seizure of his funds. That the order left it with the quartermaster and the bank to determine whose funds were subject to it. That no special order to seize plaintiff's funds by name or description being produced it was necessary that defendant should show that plaintiff came within all or either of the categories specified in the military order or in the letter of General Banks explanatory

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Grivot v. The Louisiana State Bank.

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thereof. This military order of the commanding general and his letter to the quartermaster are in evidence. The letter, after detailing the proceedings to be taken in regard to seizures of funds in banks belonging to registered enemies of the United States, officers or soldiers in service of the rebel army, adds: "The balances of persons who left the city upon its occupation by the Union troops and have not returned or have not renewed their allegiance, and whom we have reason to suppose to be actively identified with the rebellion, will be held also by the Government subject to any just claims that may be made against them."

The defendant, it is shown, paid over to the quartermaster, under this general order and explanatory letter of General Banks, the moneys deposited in plaintiff's name in the Louisiana State Bank.

The plaintiff admitted that the United States proceeded in the year 1863 to libel his property, under the act of Congress of the twenty-ninth of July, 1862, entitled "An Act relative to insurrection in the Southern States." He also admitted that he left the city of New Orleans on the twenty-fifth of April, 1862, when the Union fleet arrived there, and did not return to the city until after the surrender of General E. K. Smith, commanding Mississippi Department C. S. in May or June, 1865.

From the whole tenor of the evidence we do not see that the plaintiff has any just right to coerce the bank to make good to him a loss which it is clearly shown it was out of its power to prevent.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

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No. 3120.—VERNON K. STEVENSON v. MRS. LAVINIA EDWARDS et al.

In matters of appeal the law does not authorize the appointment of a curator *ad hoc* upon whom citation of appeal may be served. In such a case, if the appellee is not present service of appeal may be made upon the advocate or attorney of record, but it cannot be made legally upon a curator *ad hoc* appointed for that purpose.

**A**PPEAL from the Fifth Judicial District Court, parish of Iberville. Posey, J. Race, Foster & E. T. Merrick, for plaintiff and appellant Lea, Finney & Miller, for appellees.

HOWE, J. The judgment in this case was rendered in September, 1866. On the eleventh April, 1870, Mrs. M. D. Edwards, joined by her husband, James Wilson, prayed for and obtained the appeal now before us on the ground that she was a minor when the judgment was rendered, and had been emancipated by marriage on the fifteenth April, 1869, that is, within a year prior to her application. She specially prayed that the plaintiff, Stevenson, a resident of New York,



be made a party appellee, and that an "attorney *ad hoc*" be appointed to represent him, and to receive citation, and the judge appointed G. W. Wailes, Esq., "curator *ad hoc*" for this purpose.

A motion having been made to dismiss the appeal—it must be dismissed for this grave irregularity (21 An. 465, 157)—unless the fault should be deemed not attributable to appellants. We must think the appellants in fault, since, instead of asking for citation to be served on the advocates of plaintiff, or leaving such service to be made as matter of course, they specially prayed for the appointment of a representative not recognized by law. Another objection to permitting citation to be now issued and served on the proper parties, is, that about three years have elapsed since the emancipation of the minor.

Appeal dismissed.

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No. 2438.—CHRISTOPHER DE HARDE, Master of the ship Constantia,  
v. BARK MAGDALENA, MASTER AND OWNERS.

The State courts can not enforce an admiralty lien given by law for the recovery of damages for a maritime tort; and an attachment will not lie where the claim is for damages *ex delicto*. 22 An. 388.

A master in command of a vessel is not liable for the damages which his vessel has done to another by a collision if he was not on board of his vessel at the time of the collision.

**A**PPEAL from the Seventh District Court, parish of Orleans. *Collens, J. E. W. Huntington*, for plaintiff and appellee. *Hays & New*, for defendants and appellants.

WYLY, J. The plaintiff sues the bark Magdalena, master and owners, for the damage done his ship, the Constantia, by a collision between it and the bark Magdalena. Citation was only served on the master; the owners are therefore not before the court. The bark was attached and subsequently released on bond.

The defense is the general denial and the averment that at the time of the collision the bark was under the control of the Harbormaster of New Orleans, and that the damage was not occasioned by any fault, negligence or unskillfulness on the part of the officers or crew. The court rejected plaintiff's demand and he has appealed.

The collision, it seems, occurred while the Constantia was lying at the levee, in this city, a short distance astern the Magdalena. The harbormaster began to move the Magdalena to another position when her head line parted, and her bow swinging around came in collision with the Constantia, causing the damage complained of. This case is similar to that of *Young v. The Princess Royal*, 22 An. 388, upon which the defendant relies. As was said in that case, we will remark that the State courts can not enforce an admiralty lien given by law for the recovery of damages for a maritime tort; and an attachment will not lie where the claim is for damages *ex delicto*.

*De Harde, Master of the ship Constantia, v. Bark Magdalena, Master and Owners.*

But it was perfectly competent for the plaintiff to institute a personal action against the master and owners for whatever damage he may have suffered by the tort; and this suit may be so treated.

From the evidence we are satisfied that the damage occurred by the fault of the harbor-master, who commanded the vessel at the time, the master not being on board when the collision occurred. Whether the owners are responsible or not for the negligence or fault of the harbor-master which occasioned the collision, we can not in this case decide, because the owners are not before the court. We have no difficulty, however, in deciding that the master is not responsible to the plaintiff for the damage, because he was not on board the vessel at the time of the collision. One agent ought not to be held responsible for the fault of another, although the principal or owner of the vessel may be responsible for the fault of either.

If the law at this place makes it the duty of the harbor-master to take personal command of the vessel in causing it to be moved from one position to another at the levee, it may be that the owner is responsible for the fault of the harbor-master, on the theory that the latter is his agent, selected for that purpose by the law, to which the owner voluntarily assented when he sent his vessel to this port. This question, as before remarked, can not be determined now, as the owners of the vessel are not before the court.

Judgment affirmed.

Rehearing refused.

No. 3396.—*A. F. DUNBAR v. JOHN STEIB and JOSEPH KREIGER.*

A mere creditor of an insolvent has no right to claim the possession of property that has been surrendered, nor has he any right to demand or receive the rents of such property. In such a case the possession belongs of right to the syndic and the rents belong to the owner.

**A**PPEAL from the Eighth District Court, parish of Orleans. *Pardee, J. W. B. Hyman and R. King Cutler*, for plaintiff and appellee. *Labatt & Aroni*, for defendants and appellants.

**WYLY, J.** The plaintiff alleges that the defendant John Steib is attempting to take possession of the property described in the petition, which is in possession of Joseph Kaizer, an insolvent, who holds it for his creditors, of whom the petitioner is one to the amount of \$2000; that the title which Steib acquired from the syndic Kreiger is a mere simulation; and that if Steib should get possession he and the other creditors of the insolvent will be injured. The prayer of the petition is that an injunction issue; that the pretended sale be annulled, and that the "petitioner have judgment against the said Steib for the rents, say one thousand dollars," and for \$400 damages. The court dissolved

the injunction with one hundred dollars damages, and the plaintiff has appealed.

The record shows that Steib sued the insolvent Kaizer, whose possession the plaintiff seeks to maintain, for possession of the property described in the petition on the ground that he acquired the same from the syndic of said insolvent, and there was judgment affirming the title and ordering the delivery of the property to him.

Under this state of the case we do not see why a creditor should seek to maintain the possession of the insolvent to the property surrendered by him to the syndic and subsequently sold by the latter to the plaintiff.

A mere creditor has no right to claim the possession, because the property does not belong to him; and he can not assert for the insolvent a right which the latter could not claim for himself. The property having been surrendered its possession belongs to the syndic if there has been no sale; but if a sale, as appears in the record, the possession belongs to the purchaser John Steib. So whether the title of Steib be valid or not, the insolvent can not be maintained in possession; and neither he nor the plaintiff has the right to demand it.

It is still more remarkable that the plaintiff, a mere creditor of the insolvent, should set up a claim for the rent of the property and pray judgment for \$1000 against Steib who purchased it from the syndic, a sum equal to one-half the amount he alleges the insolvent owes him. The rent of property belongs to the owner thereof; and neither the plaintiff nor the insolvent pretends to be such.

Let the judgment dissolving the injunction with damages be affirmed with costs.

Rehearing refused.

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No. 3744.—JOSEPH HOY & Co. v. BENJAMIN WEISS.

To maintain an attachment under the allegation "that the defendant is about to assign and dispose of his property with intent to defraud his creditors," the evidence must show affirmatively, that the defendant is about incumbering or disposing of his property with the intention of defrauding his creditors.

**A** PPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. E. A. Hunter*, for plaintiffs and appellants. *M. Ryan*, and *A. Casabat*, for defendant and appellee.

**WYLY, J.** The plaintiffs appeal from the judgment dissolving the attachment sued out by them on the alleged ground that the defendant was about to mortgage, assign and dispose of his property with intent to defraud his creditors.

An examination of the evidence satisfies us that the attachment improperly issued and the court did not err in dissolving it. There is

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nothing to show that the defendant was about to dispose of or encumber his property with the intent of defrauding his creditors. On the contrary, his business was going on in the usual manner and he was absent at the time endeavoring to adjust or effect an honorable settlement with his creditors.

This case is like that of *Mouler & Dumestre v. Rosengarden* 22 An. 531, where the attachment was dissolved because the evidence showed there was no intention to dispose of his property, on the part of the defendant, with the view to defraud his creditors.

Judgment affirmed.

No. 3842.—STEPHEN K. FOWLER v. SUCCESSION OF J. G. GORDON.

A final judgment of the parish court decreeing a partition and ordering the heirs to be put in possession of the estate, can not be treated as an absolute nullity, nor can it be attacked collaterally.

Where the executor has filed his final account and has been discharged, and the heirs have been put in possession the creditors of the estate are entitled to recover from each heir his virile share of the debt of his ancestor, and each one of the heirs may be made parties to such a suit.

**A**PPEAL from the Thirteenth Judicial District Court, parish of Tensas. *Hough, J. T. P. Farrar and Raco, Foster & E. T. Merrick*, for appellants. *Aroni, Mayo & Spencer* and *F. P. Clinton*, for defendants and appellees.

WYLY, J. While this suit was pending to enforce a claim against the succession of J. G. Gordon, the heirs were put in possession of the property under a judicial partition, and the executor rendered his final account, which was duly homologated, and he was discharged from the administration of the estate.

After this, the executor excepted to the further prosecution of the suit against him. The court sustained the exception abating the suit as to the executor, but reserving the right of the plaintiff to make the heirs parties defendant. From this judgment the plaintiff appeals.

Article 1012 Revised Code declares that, "in obtaining possession of the effects of a succession, the heirs shall not be permitted, under any pretense whatsoever, to have an actual delivery of any property of such succession which may be in suit, or to receive any money of such succession when there shall be claims thereon pending in court, unless they previously give bond with good and sufficient security, if the plaintiffs in such suits require it." \* \* \*

Article 1671 Revised Code declares that, "the heirs can, at any time, take the seizin from the testamentary executor on offering him a sum sufficient to pay the movable legacies, and on complying with the requirements of article 1012."

In the case before us there were no movable legacies and the plaintiff in the suit did not require the bond contemplated by article 1012.

The heirs had therefore the right to demand the seizin of the property from the executor, and he had no right to refuse it.

If the plaintiff in this suit, which was pending, did not require the bond, the heirs were not bound to give it. By accepting the succession and going into possession each heir became indebted to the creditor of his ancestor for his virile share of the debt. By this partition the plaintiff is not remediless. He can make the heirs parties defendant and recover judgment against them jointly for whatever sum that may be found to be due him by their ancestor.

The judgment of the parish court, decreeing the partition and ordering the heirs to be put in possession of the property, can not be treated as an absolute nullity, nor can it be attacked collaterally. And the same remark is applicable to the judgment homologating the account of the executor and discharging him.

Judgment affirmed.

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No. 3818.—J. M. WELLS v. O. K. HAWLEY, Administrator.

A claim for overseer's wages is prescribed by three years. A contract by which one person assumes to act as mandatory for another is from its nature gratuitous, and if the contract stipulates no compensation then the mandatory can not recover. R. C. C. 2991.

**A** PPEAL from the Ninth Judicial District Court, parish of Rapides. *Oreborn, J. R. J. Bowman*, for plaintiff and appellant. *R. A. Hunter*, for defendant and appellee.

**HOWE, J.** The plaintiff claimed the sum of \$8540 from the defendant as the administrator of S. D. Linton for services alleged to have been rendered by him as agent to manage and care for the plantation of Linton in the parish of Rapides from August, 1863, to January, 1867.

An intervention in the case was dismissed and the intervenor has not appealed.

The defense before us is the general denial and a plea of prescription of two, three and five years. There was judgment rejecting the claim of plaintiff and he has appealed. We see no error in the judgment. The services of plaintiff appear to have been of a two-fold character; as overseer in 1863 in ginning certain cotton, and as agent in caring for the place at the request of Perkins, the agent of Linton. The testimony is vague and unsatisfactory. So far as the claim is for over-seeing, it is prescribed by three years. Rev. C. C. 3538. So far as the claim is for compensation as mandatory, the written appointment fixes none, and the contract is by its nature gratuitous. Rev. C. C. 2991. We find nothing in the evidence that is sufficient to rebut the presumption thus established by law that the services of plaintiff, a neighbor of Linton, were performed merely as an act of neighborly kindness. 21 An. 553, *Wood v. McCranie*.

Judgment affirmed.

Cavalier v. Police Jury, Right Bank, Parish of Jefferson.

No. 3423.—LOUIS CAVALIER v. POLICE JURY, Right Bank, Parish of Jefferson.

The exception that the petition discloses no cause of action, admits for the purposes of its trial, that the allegations in the petition are true, and if the allegations disclose a cause of action the exception will be overruled.

**A** PPEAL from the Second Judicial District Court, parish of Jefferson. *Pardee, J. R. L. Preston*, for plaintiff and appellant. *J. Fisk*, Parish Attorney, for defendants.

WYLY, J. The plaintiff sues the Police Jury of the parish of Jefferson for \$3535 36, the value of a levee which he alleges he was ordered to build by said police jury in 1867, and which work was accepted by it, after the completion thereof. The court dismissed the demand on the plea that the petition discloses no cause of action against the defendant.

We think the court erred. This exception admits the allegations of the petition to be true. We think the petition discloses a good cause of action. If the police jury ordered the plaintiff to do the work, as is conceded in the defendant's brief, it is certainly bound to pay him a fair remuneration therefor after accepting the work. This case falls within the rule stated in *Kennard v. Lafarge*, president of the police jury, parish of Avoyelles. 23 An. 168.

It is therefore ordered that the judgment appealed from be annulled, that the peremptory exception be overruled, and that this cause be remanded to be proceeded with according to law, appellee paying costs of appeal.

No. 3782.—BUSH & THOMSON v. E. F. DEWING.

A defendant in a sequestration suit who appears by petition, and asks to bond the property sequestered and take it from the possession of the court, is concluded from urging the plea of want of citation. 21 An. 438; 22 An. 368.

**A** PPEAL from the Fifth Judicial District Court, parish of Iberville. *Possey, J. Barrow & Pope*, for plaintiffs and appellees. *A. & E. Talbot*, for defendant and appellant.

HOWE, J. The defendant has appealed from a judgment made final after default, and makes the point that he was never legally cited. The return does not show a citation technically regular, but the record reveals the fact that after the sequestration and the service of citation, such as it was, the defendant came into court by a petition, alleged that this suit was "pending" against him, availed himself of the privilege of a defendant to bond the property and take it from possession of the court, and prayed for general relief. We do not think that after such an appearance he can be heard to say that he was not regularly cited. 21 An. 438; 22 An. 368, *Abbott v. Wilbur*.

Judgment affirmed.

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## No. 3728.—MARY ANN WELLS AND HUSBAND v. THE CITIZENS' BANK OF LOUISIANA.

By the provisions of the charter of the Citizen's Bank of Louisiana a married woman may become a subscriber to the capital stock of the bank, and bind herself or her property conjointly with her husband, or *in solido*, cede, mortgage and hypothecate her property to the bank, the same as if she were a *feme sole*.

A suit is instituted by the wife to annul a sale of her property mortgaged to the bank under this charter, on the allegation that the loan from the bank inured to the benefit of the husband. Held—That under the provisions of the charter the wife as a subscriber to the capital stock of the bank was authorized to mortgage and hypothecate her separate property to the bank, and that a sale regularly made to enforce the mortgage rights upon her property thus mortgaged was not null because the bank had not shown that the loan inured to her separate benefit.

**A**PPEAL from the Ninth Judicial District Court, parish of Grant. *Orsborn, J. W. B. Hyman and E. J. Bowman*, for plaintiffs and appellees. *Ryan & White*, for defendant and appellant.

This case was tried by a jury in the court below.

**HOWE, J.** In 1859 the plaintiff, separate in property from her husband, became a stockholder of the Citizens' Bank, and to secure her stock note and loan, mortgaged her plantation, which was paraphernal property. Her husband authorized the transaction.

In May 1870 the property was sold at sheriff's sale under an order of seizure and sale sued out by the bank, and the bank became the purchaser. In November, 1870, Mrs. Wells instituted this action to annul the sale, reciting various alleged irregularities and nullities. The bank answered by a general denial. The cause was tried before a jury who rendered a general verdict for plaintiff, and judgment having been rendered thereon accordingly, annulling the sale, the bank has appealed.

Among the many points made by plaintiff on her pleadings we find but two which seem to be insisted on as meriting discussion :

*First*—It is alleged by plaintiff, in her supplemental petition, that "the pretended purchase of stock by petitioner and the pretended loan made upon said stock to petitioner were the purchase and transactions of her husband; and the said pretended purchase and loan never inured to her benefit; but were the speculations and acts of her said husband." She further alleged that the mortgage was made under marital influence and did not come under the provisions of the twenty-fifth section of the charter of the bank.

Admitting that the question thus raised can be examined in an action to examine a sale, we can not assent to the correctness of the views of the plaintiff on this point. By the third section of the charter of the bank it is provided that it shall be competent for all persons who shall be in good faith the owners and possessors of real property within this State and to all bodies corporate and politic authorized

and empowered thereto in law, to become subscribers to the capital stock of said bank under the rules and regulations established by this act." Acts of 1833, p. 174. By the eleventh section each stockholder "shall be entitled to a credit equal to one-half the total amount of his stock."

By the twenty-fifth section it is provided that "in all contracts or mortgages entered into by any person or persons with the said corporation for any of the purposes mentioned in this act, if any such person or persons should be married, it shall be lawful for the wife or wives of such person or persons to join in the said contract and to bind themselves conjointly and *in solido* with their husbands, and to renounce, cede, mortgage and hypothecate her rights, privileges, or property, as well dotal as of any other nature or kind whatever."

We think it clear that the effect of these provisions is to render the obligation of the plaintiff perfectly valid. She had a right to become a stockholder; as a stockholder she had a right to a loan; and by the twenty-fifth section the disabilities imposed by art. 2412 of the Code of 1825 were removed.

If the transaction was what it purported to be, a subscription by her, a loan to her, and a mortgage to secure the same, then she was clearly bound, like any other sane person of full age. If, on the contrary, it was by connivance between her and her husband in reality a subscription by him, and a loan to him, then she was bound under the twenty-fifth section. To decide otherwise would be to defeat the object of the charters of the property banks as explained by this court in *Bank v. Farrar*, 1 An. 55. Or, to look at the question from another standpoint, under the regime established by the sixty-first law of Toro and continued by art. 2412 of the Code of 1825, and by the decisions thereunder, the mere allegation by a married woman that the debt upon which she was sued did not inure to her separate benefit, threw on the creditor the burden of proving that it had so inured. But by the provisions quoted, as expounded in the case of *Bank v. Farrar*, the defendant in this action is not subject to this rule. That onus is not on the Citizens' Bank as respects the contracts of stock subscription, loan and mortgage. Since then the plaintiff has merely alleged that these transactions were speculations of her husband, but has not offered a particle of proof to support her allegations, her case on this point must necessarily fail.

*Second*—The plaintiff also relied on the plea of prescription of five years as against the claim which was enforced by the sale under the executory process. We do not think that the plea of prescription can be urged at this time and in this form, even if it ever had any foundation in the facts of the case. The executory proceedings were regular in form, the sale was made, the plaintiff did not attempt to injoin



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Mary Ann Wells and Husband v. The Citizens' Bank of Louisiana.

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it on the ground that the debt had been extinguished by prescription, as she might have done without bond under C. P. 739, 740. We imagine it is too late now to attempt to annul a judicial sale on the ground that the debt upon which the order of seizure and sale was granted was prescribed.

On the whole we find no foundation for the verdict of the jury. It is therefore ordered that the judgment appealed from be avoided and reversed, and the verdict set aside. It is further ordered that there be judgment in favor of defendant with costs in both courts.

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No. 3825.—In the matter of the SUCCESSION OF JOHN L. POINTER.  
Opposition to Executor's Account.

A person can not claim to be placed upon the tableau as a legatee of the testator under the will, if it has been decided that his claim is simulated and fictitious.

**A**PPEAL from the Parish Court, parish of Iberville. *Adonis Pitot*, Parish Judge. *Samuel Mathews*, for executor. *A. & M. Voorhies*, for defendant.

LUDELING, C. J. This is an opposition on the part of Mrs. Maria Schwing, the universal legatee of John L. Pointer, to the account of the executor admitting Antoine P. Marionneaux as an unconditional legatee under the will.

In 1869 John L. Pointer died, leaving a will whereby he directed that his executor should pay over to Antoine P. Marionneaux whatever amount should be realized from certain suits then pending in the Sixth District Court of New Orleans.

The universal legatee opposes the delivery of the proceeds of that litigation, now in the possession of the executor, to Marionneaux until he produces and cancels a note given by the testator to Marionneaux to represent said proceeds, and then only the net proceeds after deducting attorney's fees, etc., paid by the testator, as the testamentary disposition was made under the following circumstances :

In 1865, Marionneaux, being pressed by his creditors, transferred by a simulated title two-thirds of a steamboat, named the "Fanny Fisk," to Pointer, which was subsequently insured by Pointer in the Merchants' Mutual Insurance Company of New Orleans, and lost in the waters of Mexico while under the control of Marionneaux. The Company refusing to pay the insurance, Pointer instituted suit and obtained a judgment for the same in the Sixth District Court of New Orleans, which was affirmed by the Supreme Court. At this juncture, Marionneaux's creditors seized that judgment. Pointer enjoined the seizure on the ground that the judgment was wholly his property, and the creditors in answer alleged that the sale of the "Fanny Fisk" was

simulated, and the judgment was the property of their debtor. About the fifteenth of December, 1868, this litigation was compromised, and Pointer, *with the sanction of Marionneaux*, gave one-half the judgment, which was about eight thousand dollars, to the creditors, and all the judgment creditors of Marionneaux who could have been injured by said simulation were satisfied. That on the fifteenth of December, 1868, after this compromise, Pointer executed his note or due bill in favor of Marionneaux to represent said amount as coming to Pointer by this compromise, and as the petitioners believe took a counter letter from Marionneaux.

Having decided in the suit of *Lewis E. Woods v. Succession of John L. Pointer* No. 3852, that the note sued on (and which is the same referred to on the opposition), was without any consideration, the sale of the Fanny Fisk having been a simulation, it is unnecessary in this case to pass upon the various questions discussed in the brief and raised by the bills of exceptions.

The judge *a quo* sustained the opposition. We see no error in the decree.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed with costs of appeal.

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NO. 3240.—LOUISIANA STATE BANK *v.* DAVID N. BARROW *et al.*

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In this case an order of appeal was granted from one branch of the judgment, but no bond was given. In the other a bond was given, but no order of appeal was granted.  
Held—That the appeal must be dismissed for want of jurisdiction.

**A**PPEAL from the Fifth Judicial District Court, parish of Iberville. *Posey, J. A. Talbot*, for plaintiff. *Barrow & Pope*, for defendants.

WYLY, J. The plaintiff sues the defendant, David N. Barrow, as the indorser, and the defendant, Lavinia Edwards, as the maker of a promissory note. The court gave judgment against the maker, but rejected the demand against the indorser.

We find in the record an order of appeal taken by plaintiff from that part of the judgment rejecting its demand against Barrow, but no bond seems to have been given. We find, however, an appeal bond given by the defendant, Mrs. Edwards, but there is in the record no order of appeal in her favor. We also find the agreement of counsel "that one transcript shall be made for the two appeals taken in this case." As consent can not give jurisdiction, and as neither of the appeals has been perfected (one for want of an appeal bond, the other for want of the order of appeal), we are constrained to decline jurisdiction of the appeals.

It is therefore ordered that the appeals herein be dismissed at the costs of the appellants.

Rehearing refused.

No. 2314.—BUSH & GOODE v. EWING CHAPMAN—JOHN B. MURISON,  
Intervenor.24 277  
e122 479

A confession of judgment by a defendant, who is domiciled in a different parish from that in which the judgment is rendered, is an absolute nullity as against privileged creditors, 23 An. 255, and the privileged creditors have such an interest as will authorize them to urge the absolute nullity of such a judgment whenever and wherever it is sought to be enforced against property upon which they have a privilege.

**A** PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Louis Bush*, for plaintiffs and appellants. *Lacey & Butler*, for intervenor and appellee.

Howe, J. The plaintiffs obtained a judgment by confession against the defendant in the Fourth District Court of New Orleans, on the twenty-third November, 1868. The defendant was at that time and had been for some years a resident of and domiciled in the parish of Terrebonne.

Execution was issued on the judgment and seizure made of the leases of certain plantations in the parish of Terrebonne, and of the movables and crops on two of them. John B. Murison intervened, claiming to have a privilege for plantation supplies furnished by him on the crops, and a pledge of all the other movables, and obtained an order permitting him to bond the property which had been seized, and this was accordingly done.

Various proceedings took place in the case, which it is not deemed necessary to detail specifically, and after trial the court *a qua* gave judgment in favor of the intervenor Murison, so far as the crops of sugar and molasses were concerned, and against him as to the other movable effects which had been seized. The plaintiffs alone have appealed.

We do not perceive any error in the judgment so far as plaintiffs are concerned. Murison had a privilege on the crops seized, for supplies furnished, to the amount of about \$14,000—an amount largely in excess of the apparent value of the sugar and molasses. It appears also that on the twenty-seventh November, 1868, he caused the entire property on the two plantations to be seized under a judgment for upwards of \$40,000, which he had obtained in the United States Circuit Court against the defendant Chapman. It is evident that the crops seized were not equal in value to the supplies for which Murison was a privileged creditor. It follows then that he had an interest to claim the absolute nullity of the judgment of plaintiffs, so far as the crops were sought to be seized under it. That the judgment was an absolute nullity as to Murison can not now be doubted. It was confessed in violation of the statute of 1861, now embodied in Rev. C. C. 162. See *Richardson v. Hunter*, 23 An. 255.

Judgment affirmed.

No. 2389.—INDIANA SLOAN, Wife, etc., v. STEVENSON & MAY—LOUISIANA STATE BANK called in warranty.

A contract of sale of a lot of cotton is complete if the price has been agreed upon and possession has been given. In such a case the sale is considered as executed, and the administrator of the estate who has made the contract will not be listened to when he comes into court and asks that it be set aside on the ground of an illegal consideration, such as Confederate money.

**A**PPPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Race, Foster & E. T. Merrick*, for plaintiffs and appellants. *Clarke & Bayne*, for defendants and appellees.

LUDELING, C. J. The plaintiffs sue the defendants to recover forty-three bales of cotton or the damages occasioned them by the wrongful taking of said cotton for defendants' use.

John A. Stevenson and A. H. May, who composed the firm of Stevenson & May, filed separate answers. Stevenson filed a general denial, and admitted that the forty-three bales of cotton aforesaid had been purchased by one Green, who transferred them to him; that forty-one bales of said cotton were delivered to him; that both he and Green were agents for the Louisiana State Bank; and that the said forty-one bales of cotton, having been accidentally shipped to Stevenson & May, were delivered by them to the said bank; and he called the bank in warranty. May denies that he had anything to do with the cotton, and reiterates the other allegations of Stevenson's answer.

The Louisiana State Bank filed an exception and answer. The exception seems to have been abandoned. In the answer it is admitted that Green and Stevenson were the agents of the bank, in the purchase of the cotton, and that Stevenson & May had delivered the cotton to the bank, the rightful owner thereof.

The evidence satisfies us that on the nineteenth of January, 1863, the administrators of the estate of Sloan, E. A. Sloan and John McLaughlin, sold to J. J. Green, agent aforesaid, forty-three bales of cotton at twelve cents per pound in Confederate treasury notes; that the cotton was weighed, paid for, and marked in the name of the purchaser, thus "J. J. G.," and that the vendors undertook to take care of the cotton and to deliver it in good order at Augusta, on the lake, at their own expense, to said Green or his order, the said vendors "not incurring any risk of fire or unavoidable accidents;" that some time afterward the bagging and ropes having been cut by Confederate soldiers, and the cotton being in bad condition was taken by the agents of Green or Stevenson off the Sloan plantation to an adjoining plantation, where it was *rebaled* and carried back to the Sloan place, to be taken care of; that the bagging and rope was furnished by Stevenson, and the cotton was rebaled by his employes. This was in January, 1865, and in consequence of a letter written by John McLaughlin to

an agent of Stevenson informing him of the condition of the cotton, and suggesting the propriety of his getting bagging and rope to have the cotton repaired. In the letter he expressed his readiness to haul the cotton to the place agreed on whenever required to do so. Subsequently when called on for the cotton, he refused to deliver it. However, after a considerable delay he did deliver the cotton, but instead of hauling the cotton without charge, as had been stipulated in the contract, Stevenson paid Mrs. Sloan \$3 25 in gold per bale for the hauling. The cotton was shipped to Stevenson & May through error; it was delivered by them to the bank, and the bank had sold the cotton long before the institution of this suit.

Under this state of facts, the administrators and the heirs sue to recover the price of the cotton, on the grounds that the contract was null for the following reasons, to wit:

It was for Confederate money, it was between alien enemies, and it was a private sale of succession property.

It is proper here to state that the suit is brought in the name of the minor heirs of Hamilton Sloan, represented by their tutrix Eliza Sloan and Indiana Sloan, in their own right and by the administrators, Eliza Sloan and John McLaughlin, and that the succession was still under administration when the suit was instituted and tried.

The evidence shows that the contract was an executed contract before the institution of this suit; nay, even before the order of General Herron had been obtained. The written contract and evidence show that the cotton was sold by the pound, that it was weighed, paid for, and marked with the initials of the name of the buyer; and that the sellers obligated themselves to keep and take care of the property for him, and to haul it to a shipping port, whenever required to do so. McLaughlin says in the act that the cotton is "*now deposited on my plantation*, and I am to take due care of the same and to store it in a covered building," etc. And Mrs. Sloan signed the same act.

"*An authority to take*, when the thing sold is ponderous and present, has all the effect of an actual delivery." But in January, 1865, the employes of the buyer took *actual* possession of the cotton (with the consent of the sellers), hauled it to another place and rebaled it for the buyer; and then returned it to the *custody* of McLaughlin & Sloan for safe keeping. As balers and depositaries of Stevenson, McLaughlin & Sloan could not question his title. 21 An. 596.

The question of duress is not important in this case, as, in our opinion, the contract of sale had been executed long before; and therefore, to premit the expression of an opinion as to whether there was or was not force, violence or threats used to obtain the possession of the cotton from the depositaries.

The contract being executed, the administrators will not be listened

to in a court of justice, when alleging their own turpitude and dereliction of duty. 3 N. S. 47; *Mulhollen v. Voorhies*; 17 La. 132, *Gravier's Curator v. Carraby's Executors*; 2 Rob. 271; *John Y. Davis v. J. H. Caldwell et al.*; 1 An. 176, *Davis v. Holbrok*; 17 An. 261, *Smidt v. Barker*.

The heirs have no right to sue for debts or damages due to the estate while it is under administration, much less have they a right to sue a third party for damages caused the succession by buying from the administrators property at private sale. Their recourse is against the administrators and their sureties. C. C. art. 1058 (1051), 12 R. 41, 323; 10 R. 457, *Succession of Ogden*; C. C. art. 1048 (1041): C. P. 976, 997.

It is therefore ordered that the judgment appealed from be affirmed with costs.

Rehearing refused.

No. 3727.—*GEORGE J. KELLER v. MATTHEW VERNON AND WIFE.*

Where an appeal in a suit by a creditor of the husband attacking the judgment of his wife against him, parol evidence is held admissible to prove that the husband received funds belonging to the wife, and the case is remanded for the purpose of admitting the same, it can not be excluded on the second trial, on the ground that there is written evidence of the fact.

**A**PPEAL from the Seventh Judicial District Court, parish of Avoyelles. *Miller, J. A. B. Irion*, for plaintiff and appellant. *Waddill & Barbin*, and *Thomas & Overton*, for defendants and appellees.

WYLY, J. The plaintiff, a judgment creditor of Matthew Vernon, seeks to annul the judgment of separation of property and for \$3600, obtained by his wife against him, and also to set aside the notarial act of transfer of the property by him to her in satisfaction thereof, alleging that said judgment and transfer were fraudulent and collusive, and intended to place the property of his debtor beyond the reach of creditors.

The defendant, Mrs. Vernon, pleads the general issue, avers the legality of the judgment and transfer and pleads the prescription of one, two, three, four and five years. The court gave judgment for the plaintiff, and the defendant, Mrs. Vernon, appeals. The case was before this court in February 1871; and the ruling of the court below, rejecting the evidence offered by Mrs. Vernon to prove the validity of the claim, on which was founded her judgment against her husband, was set aside and the cause remanded for the purpose of admitting the proof improperly excluded, and to be proceeded in according to law. See 23 An. 164.

At the trial on the remandment, the plaintiff again objected to the parol evidence offered to prove that the husband of the appellant received certain moneys from the estate of her mother, on the ground

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Keller v. Vernon and Wife.

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that the testimony of the witnesses is not the best evidence, because at the time A. R. Parks settled with her and the other heirs, a written act of settlement or partition was passed before a notary public, and that said act is the best evidence of the amount paid each of the several heirs. There is no force in this exception.

Mrs. Vernon is not seeking to prove the contents of the written instrument, nor is she engaged in a contest with her co-heirs as to the terms of the partition of the estate of her mother. She is simply endeavoring to show that her husband received certain paraphernal funds of hers, and for which she had judgment in a controversy with him.

From the evidence we have no doubt of the verity of the claim for which she had judgment against her husband. As to the objection that the property given in payment of her judgment was worth more than the amount thereof, we will remark the allegation is not established by the evidence. The other objections are without weight.

It is therefore ordered that the judgment appealed from be annulled, and that plaintiff's demand be rejected, with costs of both courts.

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No. 3681.—PIERRE DASPIT v. A. VERRET et als.

An overseer who has contracted with a planter by the year and has been discharged by the purchaser of the plantation, under a mortgage, before the year is out, cannot hold such purchaser liable for the wages due him after the date of the sale. In such a case the mortgage is superior to the overseer's privilege which has been acquired after the mortgage was given.

**A**PPEAL from the Fifteenth Judicial District Court, parish of Terrebonne. *Beattie, J. T. S. Goode*, for plaintiff and appellee. *N. H. Bightor* and *Legendre & Poche*, for defendants and appellants.

HOWELL, J. The plaintiff was employed by the defendant, Verret, as overseer for the year 1871, at a fixed salary. In August of that year, A. Miltenberger & Co. caused the plantation of Verret to be sold under a pre-existing mortgage, and became the purchasers. They immediately notified the plaintiff that he must leave, and employed another overseer. This suit was brought to recover the year's salary from Verret and A. Miltenberger & Co., *in solido*, and from a judgment in favor of plaintiff A. Miltenberger & Co. have appealed.

The judgment is erroneous as to appellants. They were not parties nor privies to the contract between plaintiff and Verret, and did not become so by their purchase at the sheriff's sale. Such a contract does not attach to nor pass with the land. The owner can not by his agreements with third persons impair the legal rights of his mortgage creditors further than specially provided by law, and one of those rights is to seize and sell the land mortgaged free of incumbrance other than those established by law or previously created by the owner.

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 Dasplé v. Verret et als.
 

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The giving of a privilege to an overseer on the crop or its proceeds, for services rendered, does not affect the land or the right of mortgagees to have the land sold, and the contract of the overseer is made subject to such existing right. The authorities cited by plaintiff do not apply to this case to the extent claimed.

The counsel for appellants admit that the latter are bound for the wages of the plaintiff to the date of the sale, and fix the amount at \$866 02.

It is therefore ordered that the judgment herein be reduced as to A. Miltenberger & Co., from \$1450 to \$866 02, and as thus amended it be affirmed. Costs of appeal to be paid by plaintiff and appellee.

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No. 3780.—SARAH WOOLFOLK et al. v. WIDOW EMILY WOOLFOLK.

The parish court is without jurisdiction *ratione materie* to entertain an injunction suit to annul a judgment of another court. It is also without jurisdiction to entertain such injunction suit where the amount involved is above five hundred dollars.

**A** PPEAL from the Parish Court of Iberville. *Edward Moore*, Parish Judge. *Samuel Mathews and Race, Foster & E. T. Merrick*, for plaintiff in partition. *Fuqua & Callihan, J. A. Breaux and A. & E. B. Talbot*, for appellant.

**TALIAFERRO, J.** In this case a judgment was rendered decreeing a partition between Mrs. Emily Woolfolk and the heirs of Austin Woolfolk, deceased. The judgment directed the partition to be effected by a sale of the property to be partitioned, and an order of sale was rendered and the matters relating to the partition were referred to a notary. Pending the proceedings in partition certain parties alleging themselves to be judgment creditors of Mrs. Emily Woolfolk in large amounts applied to the parish court of Iberville for an injunction to stay the proceedings in partition, alleging that it was gotten up in fraud of their rights as creditors and for the purpose of defeating their pursuit of Mrs. Woolfolk's share and interest in the property which was at the time of the decree of partition, and had been long before under seizure by the sheriff and advertised for sale in virtue of executions issued on their judgments. They prayed in their injunction suit that the judgment decreeing the partition be annulled, that the order of sale be rescinded, that in the event the judgment decreeing partition be maintained that their judicial mortgage be recognized and enforced as superior to any other mortgage on the property, that the plaintiffs in partition be decreed to have no mortgage on the property, that their injunction be maintained, and that they recover \$500 damages.

On the part of the plaintiffs in the partition suit a peremptory exception was taken to the injunction proceedings on the following grounds :



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Sarah Woolfolk et al. v. Widow Emily Woolfolk.

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*First*—That the amounts in controversy are largely in excess of the jurisdiction; the plaintiffs in injunction founding their demand on a judgment and judicial mortgage for \$13,790, exclusive of interest against Mrs. Emily Woolfolk, the defendants in injunction being also creditors of Mrs. Woolfolk for more than \$39,000, which is denied by the plaintiffs, and the property to be partitioned being shown by the inventory to be in value exceeding \$80,000.

*Second*—That the plaintiffs pray the court to annul its decree of partition of the property of the succession of Austin Woolfolk, while they are neither heirs nor creditors of that succession, but strangers to it, neither having nor alleging that they have any interest therein.

*Third*—By praying the court to annul a decree of partition, rendered in this case, the plaintiffs indirectly pray the court to annul a judgment of the Fifth Judicial District Court, rendered in the suit of the Heirs of Austin Woolfolk v. Widow Emily Woolfolk, which has been recognized by the parish court of Iberville in its decree of partition, this court having no jurisdiction to annul that judgment of the district court, either directly or indirectly.

On trial of these exceptions the parish court decided that it is without jurisdiction over the matters set up in the injunction suit, and dissolved the injunction, from which judgment the plaintiffs in injunction have brought this appeal.

The litigation between these various parties seems to be protracted and to have spread out into different channels. The creditors, the administrator of Mille and Edward Durrive, representatives of the former firm of Degelos, Durrive & Co., it appears, obtained judgments, one for about thirteen thousand dollars, the other for about five thousand dollars, as early as 1860, against Mrs. Woolfolk. A seizure of her property was made under execution issued on one of these judgments in July, 1869. Against this seizure Mrs. Woolfolk took out an injunction on the ground that the judgment under which execution issued against her had been novated, and this forms the subject of a separate suit now before this court on appeal.

In August, 1867, the heirs of Austin Woolfolk obtained a judgment in the District Court of Iberville against Mrs. Emily Woolfolk for \$39,877, with legal mortgage on her property, to date and take effect from February, 1847. It is this judgment which the creditors, by the injunction suit now before us, are aiming indirectly to annul so far as it decrees legal mortgage against their alleged debtor Mrs. Woolfolk, which, if recognized still to exist, would antedate their own judicial mortgage. We think the parish court without jurisdiction over the matters involved in this injunction suit, and that the court *a qua* properly so decided.

It is therefore ordered that the judgment of the parish court be affirmed with costs.

## No. 3852.—LOUIS E. WOODS v. GERVAIS SCHLATER, Executor.

In a suit by the holder of a promissory note against the executor of the maker, the latter has the right to show in defense that the note was given without any consideration, and that the contract for which it was given was a simulation. In this case the evidence shows that the note was given for the sale of two-thirds of the steamer *Fanny Fisk*, and that there was in reality no sale of the *Fanny Fisk*, but that it was a mere simulation. Held—That the plaintiff, the holder of the note, could not recover from the estate of the maker of the note, because there was no valid consideration given for the note.

**A**PPPEAL from the Fifth Judicial District Court, parish of Iberville, *A. Posey, J. A. & E. B. Talbot*, for plaintiff. *Samuel Mathews*, for defendant. *David W. Barrow*, for intervenor.

**TALIAFERRO, J.** In this case the executor of John L. Pointer, deceased, is sued on a promissory note for \$8000 in favor of A. P. Marionneaux, or order, drawn by John L. Pointer, on the fifteenth of December, 1868, and made payable on demand. The plaintiff alleges that he is the bona fide owner and holder of the note under the indorsement of A. P. Marionneaux, the payee. The defendant specially denies that there ever was any consideration received for the note sued on; avers that it was pretended to be given for a two-thirds ownership of a certain steamer called the "*Fanny Fisk*," pretended to have been sold by Marionneaux to Pointer, but that there was really no sale; it being a mere simulation, an act done to secure Marionneaux's property from the pursuit of his creditors. He alleges that this suit is a plan concerted by plaintiff and A. P. Marionneaux to obtain money under false pretenses from the estate of John L. Pointer.

Judgment was rendered in favor of the plaintiff for the amount of the note and interest, and the defendant has appealed.

Pointer was the son-in-law of Marionneaux. The latter at the time of the sale of the steamer was utterly insolvent; there were many judgments against him about the time of his transfer to his son-in-law of two-thirds of the steamer. It appears that the sale was made for the consideration, as expressed in the act of sale, of \$24,000 cash in hand paid, but proof was made that notes were given for the payment of the price. Pointer insured the two-thirds interest in the steamer, which was subsequently lost on the Rio Grande, where Marionneaux was running her. Pointer sued the insurance company and recovered on the policy, in a suit in the Sixth District Court of New Orleans. Pending an appeal to this court, taken by the insurance company, Pointer died. In his will he disposes of his whole estate, even to the minutia of his watch and chain. A clause of the will is then introduced by which he instructs his executor as follows: "And in case the suit entitled *Merchants' Mutual Insurance Company v. John L. Pointer*, now pending in the Sixth District Court of New Orleans, should be decided in my favor, whatever amount may be

coming to me therefrom I instruct my executor to pay over to Antoine P. Marionneaux, my father-in-law." After judgment in his favor in the district court, four or five of the judgment creditors of Marionneaux severally seized under executions this judgment as really the property of their debtor, Marionneaux, treating the sale of his share of the Fanny Fisk as a mere simulation. Pointer intervened in these various suits, claiming the ownership of the judgment. The genuineness of his right was not however tested by judicial decree, for a compromise was made with the seizing creditors by giving them \$9000, half the amount of the judgment. It is shown that after the loss of the steamer on the Rio Grande, Pointer declared to various persons that it was no loss of his; that he had no interest in the Fanny Fisk.

It is shown that Pointer was scarcely of the age of majority when he entered into this matter of purchasing the share and interest of his father-in-law; that he was without means or facilities of any kind to pay so large an amount of money, and that he exercised no control over the boat after he bought her.

From the entire evidence, which is quite voluminous, we conclude that Pointer in the whole of the transactions relating to the "Fanny Fisk" was used to subserve the purposes of his father-in-law, who performs no creditable part in this litigation. We are satisfied from the evidence that the note sued on is without consideration and void, and to compel the executor to pay it would be against law and equity.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that there be judgment in favor of the defendant, the plaintiff and appellee paying costs in both courts.

No. 3316.—THOMAS B. FRENCH, Under Tutor v. A. B. THOMPSON.

The under tutor can not maintain an injunction to stay the foreclosure of a mortgage granted by the surviving widow (the mother of the minors) on her half of the community property, because he is not the representative of the creditors, nor is he the representative of the residuary interest of the widow in community.

**A** PPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. J. G. White*, for plaintiff and appellee. *R. J. Bowman*, for defendant and appellant.

WYLY, J. The plaintiff as under tutor of the minor heirs of Peter T. Hickman, deceased, enjoined the foreclosure of the mortgage granted by the surviving widow (the mother of the minors) on her half of the community property, described in the petition. The court perpetuated the injunction, and the defendant appeals.

We fail to perceive any interest the plaintiff has to enjoin the sale of the property mortgaged by the mother of the minors, it being her

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French, Under Tutor, v. Thompson.

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half of the community property. Whether her residuary interest in the community heretofore existing between her and the late Peter T. Hickman, the father of the minors, is susceptible of mortgage or not, on account of existing debts of the community, is a question in which the minor heirs of Hickman, represented by the plaintiff, are not concerned. The under tutor is not the legal representative of creditors, nor is he charged with the supervision of the residuary interest of the widow in community.

Let the judgment appealed from be annulled, and let the injunction herein be dissolved with costs. It is further ordered that the defendant recover judgment *in solido* against the plaintiff and his securities on the injunction bond for five hundred dollars damages.

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No. 2666.—C. E. GIRARDEY & CO. v. H. L. STONE.

An auctioneer who has property for sale can not recover commissions from the owner unless he has sold it, although the owner may have sold it at private sale before the day on which it was advertised for sale by the auctioneer. He is however entitled to recover from the owner in such a case, any expense which he may have incurred in advertising making maps, etc.

**A**PPEAL from the Fourth District Court, parish of Orleans. *Theard, J. Breaux & Fenner*, for plaintiffs and appellees. *R. & H. Marr*, for defendant and appellant.

LUDELING, C. J. H. L. Stone instructed Girardey & Co., auctioneers, to advertise certain property for sale, which they did. Before the day of sale Stone sold the property at private sale, and the plaintiffs sue to recover their commissions on the sale, and the expenses incurred by them in making the advertisement and having plots of the property made, etc.

The auctioneer is simply the agent of the owner, who has the right to withdraw his property from sale at any time before its completion. 13 La. 270. The reward of the auctioneer is a commission on sales made by him. R. Statutes p. 37, sec. 160. Auctioneers are not brokers, and the decisions relating to the latter can not be regarded as applicable to the former. But the cases in 3 An. 671, and 6 An. 26, are not applicable for another reason, to wit: nothing in this record shows that the auctioneers found the purchaser, and brought him and the seller together.

DeFerriet and Girardey testify in substance that when property is put in their hands for sale and they advertise it, that they have the exclusive control of its sale up to the day of sale; and that if it be sold before, they have a right to the commissions.

That is their opinion, which, however, does not fix the liabilities of any one.

They have a right to make such terms with their patrons, but they must prove the contracts when made. The law does not authorize them in the absence of a contract to make a charge for commissions unless they effect a sale at public auction.

No custom has been proved in this case, and therefore no implied contract can be inferred.

The plaintiffs have incurred expenses in advertising the property and having maps of the lots made; for this they are entitled to be reimbursed.

It is therefore ordered and adjudged that the judgment of the lower court be annulled, and that there be judgment in favor of the plaintiffs against the defendant for the sum of one hundred and ninety-six dollars and fifty cents, with five per centum per annum interest from judicial demand and costs of the lower court; the costs of appeal to be paid by the appellee.

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No. 3641.—JOHN T. MICHEL *v.* MILTON BENNER et al.

Execution may issue against one of several debtors condemned *in solido* to pay the same debt, without issuing it against the others, at the option of the judgment creditor.

**A** PPEAL from the Second Judicial District Court, parish of Jefferson. *Pardee, J. R. King Cutler*, for plaintiff and appellee. *J. N. Brickell*, for defendants and appellants.

**TALIAFERRO, J.** The defendants, Benner and Randlet, having obtained judgment *in solido* against the plaintiff and P. Gallagher, caused an execution to issue against Michel alone, and he enjoined the writ on several grounds. *First*—That the execution was issued against him alone, whilst it should have included Gallagher. *Second*—That some errors had been committed in regard to the names of the parties both in the writ and notice of seizure. *Third*—That the Second Judicial District Court had no jurisdiction of the matter and was without authority to issue the execution.

The judge *a quo* perpetuated the injunction on the first grounds taken and the defendants have appealed. The question presented is, can a writ of *fieri facias* be issued against one only of several debtors, condemned *in solido* for the same debt?

We are not able to concur with the judge *a quo* in the view taken by him of this question. His judgment is predicated upon the case of *Casson v. Cureton*, 12 Martin 436, and that of *Blanchard v. Zacharie*, 15 La. 541. In the first of these cases the question was whether a joint execution which had issued against two defendants being returned *nulla bona* as to one, and proceedings stayed by order of plaintiff as to the other, a separate *capias* can issue against him whose property can be found? The court decided in the negative, referring

to an act passed in 1809 directing in positive terms that no *capias ad satisfaciendum* should issue to imprison the body of any debtor, until due return by the sheriff, or other officer, of the writ of *feri facias*, stating that sufficient property was not found to satisfy the same.

The case in 15 La. Reports the same doctrine is reiterated. The facts of that case are similar to those in *Casson v. Cureton*. A *capias* had issued as to one of the parties, while the *feri facias* and *capias* was stayed as to the others.

The question before us in the present case was not directly decided in the cases of *Casson v. Cureton* and *Blanchard v. Zacharie*, although in both cases two of the three judges then on the bench expressed their views clearly *arguendo* in favor of the rule in common law practice, that the form of the execution must invariably follow the judgment, while Judge Matthews, with his usual acumen, maintained the proposition that on judgments rendered *in solido* executions may issue against all or any one of the persons so condemned.

We are inclined to adopt this view of the case, and to conclude on the principle of analogy that where the creditor may obtain a judgment only against one of several persons bound in a solidary obligation, he may if he elect to have his judgment against all, issue execution against all or against one of the debtors only.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that the injunction taken out in this case be dissolved and set aside, the plaintiff and appellee paying costs in both courts.

Rehearing refused.

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No. 2530.—G. W. BAYLEY & Co. v. J. C. JENEVEN.

In an action against a surety on a lease the burden falls on the defendant, who specially pleads his discharge from liability by the action of the plaintiff, of establishing his special defense by a preponderance of proof.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Clarke, Bayne & Renshaw*, for plaintiff and appellee. *Henry C. Miller*, for defendant and appellant.

HOWE, J. This is an action against a surety on a lease of a store in New Orleans. The defendant pleaded the general issue and the special defense that he had been discharged by the refusal of the plaintiff to deliver the premises to the lessee. The court *a qua* gave judgment in favor of plaintiff and the defendant appealed.

The onus was on the defendant to establish his special defense by a preponderance of proof. A careful examination of the evidence has not satisfied us that he has done so, and we can not therefore perceive that the lower court erred in its decision.

Judgment affirmed.

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Blessey, Harrison Brothers, Wheeling Iron and Nail Company v. Kearny et als.

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No. 3560.—E. BLESSEY, HARRISSON BROTHERS, WHEELING IRON AND NAIL COMPANY v. EDWARD KEARNY et als. (Consolidated cases).

The terms of the district courts of the parish of Orleans are fixed by law to commence on the first Monday of November and continue until the fourth day of July. Citation of appeal if made in open court during the term as fixed by law, is not necessary.

A plaintiff can not stand before a court demanding the nullity of a judgment, and at the same time claim the proceeds of the sale of property made under it. This is the rule whether the property sold be movable or immovable.

**A**PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Rogers & Blanc*, for plaintiffs and appellants. *George L. Bright*, for defendants and appellees.

HOWELL, J. Appellees move to dismiss this appeal on two grounds:  
*First*—Want of citation.

The judgment was signed in April and the appeal granted, on motion, in May. The appellees say the terms of the district courts of the parish of Orleans are monthly, and citations of appeal are, therefore, necessary in cases like this, and they cite the case of *Cuddey v. Belleville Iron Works Company*, 4 An. 584, to sustain them.

Since that decision, this point has been reviewed by this court and a different conclusion adopted. *Bethancourt v. Stephens*, 19 An. 291, *Fisk v. Gibbs, Bright & Co.*, opinion book 38, page 264.

*Second*—The transcript does not contain all the evidence adduced on the trial.

Certain documents are mentioned as omitted from the record. From the certificate of the clerk, we infer that the omission is not attributable to the fault of the appellants, and as the appellees waive the objection rather than have the cause remanded, we will overrule the motion to dismiss on the merits.

The plaintiff in the suit of *Edward Kearny v. Kearny, Blois & Co.*, under a *fi. fa.*, seized and sold the whole stock in trade of *Kearny & Bernos*, successors to the first named firm. The several plaintiffs herein having obtained judgments against both firms, levied executions upon the proceeds of said sale in the hands of the sheriff, and instituted these suits (consolidated) to enjoin the sheriff from paying the said proceeds to the plaintiff, *Edward Kearny*, and have their judgments satisfied therewith, on the grounds that the judgment in favor of said *Edward Kearny* was confessed by *Alfred Kearny*, a member of said firms, without the knowledge or consent of his copartners and with the fraudulent purpose of giving to said *Edward Kearny*, his brother, an illegal preference over other creditors; that the debt on which said judgment was founded, had long since been paid and extinguished by legal imputation; and that if it be a valid judgment against *Kearny, Blois & Co.*, the seizure and sale thereunder of the property of *Kearny & Bernos*, a different firm, was illegal.

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Blessey, Harrison Brothers, Wheeling Iron and Nail Company v. Kearny et al.

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Several grounds of defense are urged, one of which appears to us to be sufficient, to wit: the plaintiffs can not allege the nullity of the judgment and at the same time claim the proceeds of the sale made under it. This has long been the settled jurisprudence of this State. See 2 An. 684; 3 An. 454; 21 An. 263, 500; 22 An. 136. There is in principle no difference, in the application of this doctrine, between sales of immovable and movable property.

Judgments affirmed.

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NO. 3300.—ARTHUR HART v. THE CITY OF NEW ORLEANS.

The act of the Territory of Orleans of 1806, creating the office of orier to the courts and fixing the fees thereof, was repealed by the act of 1855, regulating costs and fees generally. An action can not therefore now be maintained to recover fees allowed a orier of a court under the act of 1806, because the act allowing such fees has been repealed.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Frank N. Butler*, for plaintiff and appellee. *Rufus Waples*, for defendant and appellant.

LUDELING, C. J. The plaintiff claims \$4222 as the transferee of E. H. Lehman and G. Tournade, alleged to have been criers of the Sixth District Court, in four thousand two hundred and twenty-two tax suits, and for which they charge one dollar in each case.

He relies upon the act of the territory of Orleans entitled "An Act establishing an explicit fee bill," to support his pretensions to charge one dollar in each case, and upon the articles of the Code of Practice, 758 and 759, to show that such an officer as crier still exists in this State.

The act of 1806 does fix the fees of criers at one dollar, and the Code of Practice mentions criers among the officers of courts of original jurisdiction. But we are not prepared to admit the conclusion drawn from these facts by the plaintiff. The territorial act of 1806 is an act relative to fees; "an act to establish an explicit fee bill." In 1855 a law was enacted entitled "An Act to regulate and define costs and fees generally;" the twenty-seventh section of this act declares "that all laws contrary to the provisions of this act, and all laws upon the same subject matter, except what is contained in the Civil Code and Code of Practice, be repealed." The subject matter of both laws is the same, and therefore the former is repealed.

If such an officer can be regarded as still recognized by the laws of this State, which it is not necessary to decide in this case, he could only recover upon a *quantum meruit* or a special contract.

The plaintiff has failed to make out a case.

It is therefore ordered and adjudged that the judgment of the lower court be annulled, and that there be judgment in favor of defendant, rejecting the plaintiff's demand with costs of both courts.

Rehearing refused.



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Ida A. Slocomb v. Merchants' Mutual Insurance Company.

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NO. 2531.—IDA A. SLOCOMB v. MERCHANTS' MUTUAL INSURANCE COMPANY.

In 1862, while the city of New Orleans was under the control of the military authorities of the United States, the quartermaster of the army collected from the Merchants' Mutual Insurance Company fifteen thousand dollars, under a threat of punishment under general orders then in force, in case of refusal, this amount being due by the company on a policy of insurance taken for risk on four buildings in the city of New Orleans, belonging to Miss Ida A. Slocomb, which had been destroyed by fire. Miss Ida A. Slocomb brings this suit against the company for the amount of the policy. The company set up as a defense, its payment under the military order to the quartermaster.

Held—That payment having been made by the company under a military order, at a time when that authority was supreme and could not be resisted, it operated a full protection to the company, and discharged them from further liability.

**A** PPEAL from the Fourth District Court, parish of Orleans. *Theard, J. Breaux & Fenner*, for plaintiff and appellant. *A. Voorhies*, for defendant and appellee.

LUDELING, C. J. This suit is instituted to recover from the defendant the sum of fourteen thousand three hundred and thirty dollars, with legal interest from twenty-first December, 1863, being the amount of loss by fire, under a policy of insurance in favor of plaintiff.

The defense is that this sum was paid to the assistant quartermaster in New Orleans, under military orders from headquarters.

We will notice that Captain McClure, Assistant Quartermaster, was on the staff of General Banks (see general order 107, of 1862), and it was to him the money was paid, under the following order:

“OFFICE OF CHIEF QUARTERMASTER,  
New Orleans, January 20, 1864.

“Charles Sagory, Esq., President Mutual Insurance Company:

“SIR—In obedience to superior orders I require you to pay over to me at this office the amount of fifteen thousand dollars, being the amount of cash due by the company over which you preside to Miss Ida A. Slocomb, on the policy of Insurance taken for risk on her four buildings recently destroyed by fire, on Tchoupitoulas street.

“This order must be complied with at once; a failure on your part will incur the penalty of general orders 73 and 82, of date eighteenth of September and seventeenth of October, 1862.

“Respectfully,

“JOHN MCCLURE,  
“Captain and A. Q. M.”

That a payment under this order should protect the company can not be doubted, until the rulings in *Mandeville and Montgomery v. Bank of Louisiana*, 19 An. 392, and *Nelligan v. Citizens' Bank*, 21 An. 332, be overruled, and we can perceive no good reason for doing that.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed with costs of appeal.

## No. 3794.—JULES LEVY et als. v. POLICE JURY OF POINTE COUPEE.

The assumption of a mortgage by a purchaser of the property and the payment of the interest as it becomes due interrupts prescription as to the mortgage creditor, and the rank and vitality of the mortgage is preserved.

The execution of a second mortgage on a different piece of property to secure a debt already secured by a mortgage on other property does not *ipso facto* novate the first mortgage.

**A**PPPEAL from the Seventh Judicial District Court, parish of Pointe Coupee. *Miller, J. Edward Phillips*, for plaintiffs and appellees. *Haralson & Claiborne*, for defendants and appellants.

HOWELL, J. On twelfth June, 1850, Zenon Ledoux borrowed from the Police Jury of Pointe Coupee \$2540 of the "Poydras Fund" and executed a mortgage on his plantation to secure its payment. On twenty-third December, 1850, Ledoux sold said plantation to Wm. A. Patterson, who assumed to pay said mortgage debt as part of the price. On tenth January, 1851, Patterson sold to R. W. McRae, who assumed the said debt as a part of the price. On twentieth February, 1852, McRae sold to Ovide Lejeune, who also assumed said debt as a part of the price. And on ninth December, 1866, Lejeune sold to J. C. Patrick, who likewise assumed the same as a part of the price. The annual interest on said loan has been regularly paid by the respective owners of the land mortgaged. On seventh May, 1870, this suit was instituted to have the said mortgage declared inferior in rank and postponed to the legal mortgage in favor of Mrs. Marguerite Levy, one of the plaintiffs, which attached to all the property owned since twelfth April, 1854, by said Ovide Lejeune, to whom she was married in 1842, and from whom she was divorced in April, 1856. This demand is based on the ground that the said claim or debt is extinguished by prescription and novation.

The admission "that the interest on the capital has been regularly paid by the parties who subsequently became owners of the land," is proof of the interruption of prescription as to all the parties who were liable for the payment of the debt. Each successive purchaser assumed its payment for the benefit of the preceding one, and the payment of the interest was so made in cash in discharge of the former, and with his implied consent, and hence the vitality and rank of the mortgage upon the land were preserved. See 12 R. 399; 21 An. 521. Nor does the record sustain the plea of novation. Concede that the act of mortgage executed, on the twenty-seventh March, 1853, by Ovide Lejeune, in favor of the police jury on another and different tract of land, was intended to secure this debt, it is neither stipulated nor intimated therein or elsewhere that the existing mortgage on the land acquired from and mortgaged by Zenon Ledoux, was canceled or extinguished, or the debt secured by it novated. The indorsement

made on sixteenth February, 1858, by the recorder on the record of the mortgage of Ledoux; as to the canceling of the mortgage in the name of McRae, has no connection with this act by Lejeune on twenty-seventh March, 1853. And furthermore, Lejeune sold the land in question on ninth December, 1866, to Patrick, subject to this very mortgage.

“Novation is not presumed; the intention to make it must clearly result from the terms of the agreement, or by a full discharge of the original debt.” R. C. C. 2190.

In this case the debt and mortgage created by Ledoux in favor of the police jury were recognized by each successive purchaser, and the payments made of the interest on the capital loaned kept the debt and mortgage in force. Consequently, the property passed into the hands of Lejeune subject to the said mortgage, and nothing has been done by Lejeune and the police jury to impair its legal force and operation.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment rejecting the demand of plaintiffs with costs in both courts.

Rehearing refused.

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No. 1741.—JOHN T. NORRIS v. J. K. COLLINS, Executor.

A dative testamentary executor who has filed his final account and obtained his discharge, can not afterward represent the estate in any suit or controversy between the legatees about the rents and revenues of the estate while under his administration.

**A**PPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. D. O. Labatt*, for plaintiff and appellant. *Hornor & Benedict*, for defendant and appellee.

HOWELL, J. Pending the publication of the final account filed by the defendant Collins as dative testamentary executor of John Jerrison, the three particular legatees presented themselves to be recognized as such and put in possession of the property bequeathed to them and suggested that they were entitled to the rents and revenues thereof from the death of the testator, and submitted the same to the court. They were recognized and put in possession, “reserving their rights, if any they have, to the fruits and revenues of said real estate.”

On the next day the account which disposed of the rents to the universal legatee, was homologated. Some months afterward the executor obtained his discharge, and two or three months still later this proceeding was taken by one of said particular legatees against him as executor and as agent of two other particular legatees to recover one-third of the said rents, fixed at \$600. Collins pleaded his discharge and his want of authority to represent the succession or the special legatees.

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Norris v. Collins, Executor.

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From a judgment sustaining this plea the plaintiff has appealed. He was a party to the mortuary proceedings, and can not treat the two judgments homologating the final account and discharging the dative executor as nullities.

The record shows that the executor settled with the universal legatee for the rents, and the recourse of plaintiff is not against Collins in his fiduciary capacity under the circumstances.

Judgment affirmed.

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No. 3734.—A. ROCHEREAU & Co., Agents, v. MARCEL GUIDRY—J. JEANNEAUD & Co., Garnishees.

A garnishee in attachment proceeding is not entitled to appeal from an interlocutory order of the court directing the sheriff to seize and hold the funds in the hands of the garnishee subject to the decision in the attachment suit, because the garnishee, being a mere stakeholder, has no interest in the disposition to be made of the funds attached.

**A**PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. J. A. Seghers*, of garnishees, appellants. *Charles Louque*, for appellee.

WYLY, J. The plaintiffs attached in the hands of the garnishees, J. Jeanneaud & Co., some two thousand dollars belonging to the defendant. The latter, alleging his inability to give bond in order to release his funds attached, took a rule on the plaintiffs and the garnishees, to show cause why the funds should not be turned over to the sheriff and be held by him pending the litigation.

From the judgment making the rule absolute, the garnishees, J. Jeanneaud & Co., have taken this appeal.

The defendant, Marcel Guidry, the appellee, now moves to dismiss the appeal on several grounds, the most important being that it is an interlocutory decree which can cause no irreparable injury to the appellants, the garnishees.

We do not see what interest the mere stakeholders have in the interlocutory order, or how it can work them an irreparable injury. The funds belong to the defendant and are held by the garnishees subject to the rights of the plaintiffs, who caused the attachment to be levied.

Now as the court has made an interlocutory order contradictorily with both parties (the plaintiffs who attached, and the defendant who owns the funds), requiring them to be turned over to the sheriff for his keeping pending the litigation, we do not see how the garnishees can suffer irreparable injury. If they obey the order they will be protected against both the attaching creditors and the owner of the funds, because both being parties to the order are bound thereby.

Let the appeal herein be dismissed at the costs of the appellants.

Rehearing refused.

## No. 2791.—LOUIS SULSTRANG v. NICHOLAS BETZ.

Real property in the name of a married woman belongs to the community, and she can not maintain a petitory action to recover it without alleging and showing that she has acquired the community interest in the property since its dissolution.

**A** PPEAL from the Second Judicial District Court, parish of Jefferson. *Pardee, J. M. E. Livaudais*, for plaintiff and appellee. *Hyman & Casabat*, for defendant and appellant.

LUDELING, C. J. This is a petitory action. The act, under which the plaintiff claims, shows that she was a married woman at the time of the purchase, and there is no allegation in the petition or elsewhere that she was separated in property from her husband, or that the price paid was a reinvestment of her paraphernal property; neither is there any evidence to establish either fact.

The property, therefore, did not belong to the plaintiff, but to the community. There is no evidence that since the community has ceased to exist, the plaintiff has acquired the rights of the community to this property. There is no necessity in this case to inquire whether or not there were irregularities or illegalities in the proceedings after judgment, but preceding the sale, whereat the defendant bought, inasmuch as the plaintiff, in a petitory action, must recover on the strength of his own, and not in the weakness of the defendant's title.

It is therefore ordered and adjudged that the judgment of the lower court be annulled, and that there be judgment of nonsuit, dismissing her demands, with costs of both courts.

Rehearing refused.

## No. 2403.—JAMES L. LOBDELL v. WM. H. BUSHNELL et al.

A commercial partnership, although dissolved, still exists for the purposes of liquidation, and the partitioning of the gains, and the partners may be sued before the court of its domicile for such purposes, and they may be brought before the court by attachment if they be non residents.

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**A** PPEAL from the Fourth District Court, parish of Orleans. *Theard, J. Elmore & King*, for plaintiff and appellant. *Budd & Grover* and *A. Robert*, for defendants and appellees.

HOWE, J. The plaintiff, residing in the parish of West Baton Rouge, instituted this action against Wm. H. Bushnell, alleged to be a resident of some of the northern or eastern States, T. W. Colwell, a resident of West Baton Rouge, and John S. Woodward, alleged to be a resident of New Orleans, for the settlement of a partnership which had existed between the plaintiffs and defendants.

The partnership appears to have carried on its business chiefly in New Orleans, but to have been dissolved about two years prior to the institution of the suit.

The defendant Colwell, by exception, declined the jurisdiction of the court in New Orleans, on the ground that he resided, as alleged by plaintiff himself, in West Baton Rouge.

A few days after the exception was filed, and before it was tried, the plaintiff suggested to the court that John S. Woodward, believed to be a resident of New Orleans, really resided in Mississippi, and procured the appointment of a *curator ad hoc* to represent him.

The demand of the petition was for a judgment against the defendants *in solido*. The court overruled the exception, and, the cause having been tried on the merits, rendered judgment against the defendants *in solido* for \$14,752 77, and the defendant Colwell alone appealed.

The facts above stated show that at the time the suit was begun the partnership had been dissolved for nearly two years, and that not one of the parties to the suit or to the partnership resided in the parish of Orleans.

It was impossible that the defendant, Colwell, residing in West Baton Rouge, could be legally sued in New Orleans, unless his case came within some of the exceptions to the general prohibition contained in the law of 1861, and now embodied in article 162, Rev. C. P. He could not even consent to be sued in New Orleans unless in these exceptional cases.

The exceptions referred to, as they existed at the time this suit was instituted, are now compiled in articles 163-8 of the Rev. C. P.; but in none do we find any authority for the case at bar.

It does not come under section 2 of article 165, for that refers to matters of partnership "as long as the partnership continues." It does fall within section 6 of the same article; for, in the first place the defendants are not sued as "joint obligors," 9 La. 547; and in the second place, if they were so sued the suit was not brought "at the domicile of any one of them."

We are constrained to the conclusion that the exception should have been maintained.

It is therefore ordered that the judgment appealed from be reversed as to appellant, and his exception of domicile maintained, and that this suit as to appellant, be dismissed at plaintiffs' costs.

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#### ON REHEARING.

LUDELING, C. J. On a re-examination of this case we are satisfied that we erred in sustaining the exception to the jurisdiction of the district court of the parish of Orleans.

The partnership, although dissolved, still continued for the purposes of liquidation, and a partition of the gains. And we think the

Lobbell v. Bushnell et al.

partners may be sued at the domicile of the partnership for such purposes. Trolong de la Société 2, p. 472. Répertoire du Journal du Palais verbo Société, vol. 11 p. 827; 6 La. 685, Lincoln, Fearing & Co. v. Executor of R. Ball; 13 La. 484, Culler v. Cochran, 3 N. S. 188.

But another sufficient reason for maintaining that the court *a qua* had jurisdiction is, that Wm. H. Bushnell, a nonresident, was sued by serving him personally with citation and petition, as to him the court had clearly jurisdiction; and the obligation sued on, although alleged by petitioner to be *in solido*, was a joint obligation, and the other obligors were necessary parties. C. C. art. 2035; 21 An. 265, Francis v. Laonie et al. The exception is therefore overruled.

On the merits the plaintiff has failed to make out a case. The evidence satisfies us that he imposed upon his associates by representing that he owned large quantities of cotton, which he was to put into the partnership at the prices for which other similar cotton could be bought, and that he failed to deliver any of the cotton to the partnership. It further satisfies us that the plaintiff did not put into the partnership the money required by the articles of partnership, nor did he give his services as required.

It is therefore ordered that the judgment as to the appellant be annulled, and that there be judgment in favor of J. W. Colwell against the plaintiff rejecting his demand with costs.

#### NO. 2414 —BYRNE, VANCE & CO. v. WILLIAM MITHOFF.

An *alias fieri facias* can not issue where an injunction has been granted restraining the plaintiff and the sheriff from executing the original *fieri facias*, and if a second *fieri facias* has improvidently issued, the proper action of the court *a qua* is to quash it

**A**PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Cooley & Phillips*, for plaintiffs and appellants. *Roselius & Phillips*, for defendant and appellee.

HOWELL, J. The defendant having a judgment against the plaintiffs, caused execution to issue and property to be seized, whereupon the plaintiffs obtained an injunction on various grounds, prohibiting the defendant and the sheriff "from executing or enforcing or attempting to enforce the writ of *fieri facias* issued out of" said court. Upon trial the injunction was made perpetual. An *alias fieri facias* was issued and the plaintiffs took a rule to quash and annul the same, on the ground that the defendant had been "perpetually enjoined and prohibited from enforcing the said judgment in his favor," by the aforesaid judgment in the injunction suit. This rule was dismissed and the plaintiffs appealed. They base their proceeding on the assertion that the word *on*, as copied in the record, is *or* in the original judgment in

the following sentence: "That defendant, William Mithoff, and Thomas L. Maxwell, sheriff of the parish of Orleans, be and they are hereby prohibited and enjoined from executing and enforcing or attempting to execute or enforce the writ of *feri facias* on the judgment rendered by the late Sixth District Court" etc., and they have brought up the original judgment and the minute book of the court to establish their assertion.

Conceding that the word is *or* instead of *on*, we can not adopt the conclusion of the plaintiffs. They did not ask the judgment against them to be annulled, and the only question before the district judge in that proceeding was, in the language of the court, whether the writ of *feri facias*, which issued therein, was authorized by the judgment. It is not denied, continued the judge, "that at some future time the judgment would warrant the writ; but it is contended that it was issued prematurely," and be so held, saying, "I am of opinion the injunction must be perpetuated and the writ complained of be quashed."

Construing the judgment, as we must do, with reference to the pleadings and questions before the court, we are satisfied that the judgment was not enjoined if it be permissible to injoin a judgment and have it in vigor. The word *or* was evidently a clerical error, and the judge *a quo* did not err in dismissing plaintiffs' rule to quash the alias writ.

Judgment affirmed.

#### No. 2939.—SUCCESSION OF J. B. NAVARRO.

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A marriage which has been declared to be null on account of an impediment in the way of one of the spouses, has nevertheless its civil fruits as to the other party who was in good faith and contracted the marriage in ignorance of the disabilities which affected the other, and also in favor of the issue of such marriage. C. C. 118.

Good faith in contracts being always presumed, the burden of proof falls upon the party who alleges fraud or bad faith. A wife who contracted a marriage with her husband in Louisiana in good faith, can not, therefore, be deprived of her interest in the succession of her husband, because it is afterward established that her husband at the time was the husband of a woman in the kingdom of Italy, by a marriage which took place prior to her marriage in Louisiana, nor can her children, the issue of such marriage, be deprived of their inheritance from their father's estate on that account.

**A**PPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. G. Schmidt and Semmes & Mott*, for appellant. *L. Cas-tera, Carleton Hunt and A. L. Tissot*, for appellee.

**LUDELING, C. J.** This is a contest for the property of Jean Baptiste Navarro, who was a bigamist. He was married in his native country, Italy, in August, 1833, to Marie Massucco. He came to Louisiana in 1841, and in 1851 he was married by a justice of the peace in Louisiana, to Anastasie Lafrance, notwithstanding his first marriage was undissolved.



## Succession of Navarro.

Anastasie died on or about the twelfth of January, 1869, and J. B. Navarro died on the twenty-first day of the same month and year. A son, Paul Augustin Navarro, issue of their marriage, survived them.

Marie Massucco died on the twenty-third of October, 1870. She left a will, whereby she constituted her brother Phillip Massucco and her sister Anna Maria Massucco, wife of J. B. Taggiasco, her heirs and universal legatees.

Navarro left property here inventoried at \$20,759, and three parties now before the court present their claims to it.

Marie Massucco claims one-half of it as surviving widow in community, and her claim seems to be conceded to her in this court by both of the other parties.

Paul Augustin Navarro, by his tutor, claims the other half of the community, as the legitimate son of Jean Baptiste Navarro, while Mrs. Louisa Navarro Anselmi, sister of the said J. B. Navarro, claimed to be entitled to his entire succession, on the ground that he left neither ascendants nor legitimate descendants, nor collateral relatives besides herself. The court *a qua* decided that each of the two wives was entitled to one-half of the community, and rejected the demand of Mrs. Anselmi. From that judgment she alone has appealed.

The only question for decision is the legitimacy or illegitimacy of Paul Augustin Navarro, the issue of the putative marriage.

The Civil Code provides that "The marriage, which has been declared null, produces nevertheless its civil effects as it relates to the parties and their children, if it has been contracted in good faith." Art. 117. "If only one of the parties acted in good faith, the marriage produces its civil effects only in his or her favor, and in favor of the child born of the marriage." Art. 118.

Good faith in contracts is always presumed; the onus of proof is on him who alleges fraud or bad faith. Rogron, Code Napoleon, expliqué liv. 1 Art. 201 Marcadé Droit Civil, vol. 1 tet. v. du marriage page 553.

After a careful examination of the evidence, we are satisfied that Anastasie acted in good faith in contracting the marriage with Navarro. Nothing in the record shows that she had ever heard, before her marriage, of his having a living wife in Europe. The justice of the peace, who performed the ceremony of marriage, and other male witnesses, who had lived a long time in the place where the marriage took place, had never heard of his having a living wife in Europe, and they believed him to be an unmarried man.

It seemed to be conceded in argument that it was not proved that she *knew before her marriage* that he had a wife in Europe, but it is insisted that this knowledge was communicated to her *after* the marriage, but before the conception of the child.

The only evidence on this subject is the testimony of the claimant,

## Succession of Navarro.

Mrs. Anselmi, herself. She says "In conversation with my brother's wife, during my visit to the parish of Plaquemines, and *after the marriage*, my sister-in-law, Anastasia Lafrance, told me that she did not recognize myself and my mother as related to her. That her only relatives were on her mother's and father's side. I then stated to her: "You said we are not related to you, because you are aware that my brother is married in Italy, and if his wife comes here, this would not be at all agreeable to you." She then answered that she did not care. She says this conversation occurred "before the birth of the child is due from the marriage of my brother with Anastasie Lafrance." She can not fix the date of this conversation. She can not state whether it was a year or not after the marriage, nor how long after the marriage before the child was born.

Her memory is bad, and her testimony is vague and unsatisfactory.

If we were to give full credence to all she says, the evidence would fail to establish *knowledge* in Anastasie that her husband had another wife living in Europe. It certainly does not prove that such knowledge was acquired *before the conception* of the child. 3 N. S., 438, Clendenning v. Clendenning; 1 An., 105, Patton v. cities of Philadelphia and New Orleans; 7 An., 252, Hubbell v. Inskatein et al.; 15 An., 137, Abston v. Abston.

We see no reason for disturbing the judgment appealed from.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed, with costs of appeal.

NO. 2350.—MARY E. FELLERS AND HUSBAND v. JULIA A. BROWN AND HUSBAND, et als.

The principal object of this action being to annul the plaintiffs' own title to a plantation, the value of which exceeded the sum of five hundred dollars: Held—That the parish court was without jurisdiction *ratione materiae*, to entertain the suit.

**A**PPEAL from the Parish Court, parish of Iberville. *Adonis Petot*, Parish Judge. *Mathews & Wailes*, for plaintiffs. *Barrow & Pope*, and *W. B. Robertson*, for defendants.

LUDELING, C. J. On the sixteenth of November, 1869, the plaintiff instituted this suit against her co-heirs for a partition of the estate of her father. She alleged that the dative testamentary executor of her father's will had never rendered an account, and she prayed that the property of the estate be sold for the purpose of affecting the partition. On the fifth of December, 1870, she filed an amended and supplemental petition, alleging that the executor and administrator of the estate of her father was sued by *herself* for a legacy of fifty thousand dollars, with legal interest from August 4, 1862; that she obtained judgment

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for the sum claimed and caused a writ of *fi. fa.* to be issued under said judgment, and that, by virtue thereof, the sheriff seized, advertised and sold the oakland plantation, and that *she* became the purchaser thereof. She avers that she believes that the said sale is an absolute nullity, and that the property is still the property of the succession of James N. Brown, and she prays that it may be sold as the property of the succession of J. N. Brown, for the purpose of making the partition.

The executor and the co-heirs of the plaintiff filed an exception to this suit, on the following grounds—that, by the testament of J. N. Brown, a special legacy was left to each of his children of fifty thousand dollars, to be paid to each, as he or she should attain the age of majority, that the plaintiff claimed her legacy under the will, and she received payment thereof; that Isaac D. Brown alone of the heirs has not received his legacy, that he has reached his majority, and he is entitled to receive his legacy, and that there are other debts due by the estate; they represent that application to sell property to pay said charges has been made, and the order to sell has been granted and the property advertised for sale. That the property of the estate can not be taken from the executor by the heirs, or a partition thereof, by licitation, be made, until an amount sufficient to discharge the movable legacy and the debts be advanced by the heirs. To the amended or supplemental petition the defendants excepted, on the ground of want of jurisdiction of the parish court *ratione materiae*. The exceptions were overruled, and upon the merits there was judgment declaring the sale of the Oakland plantation a nullity, and ordering a sale of all the property claimed to belong to the succession to affect the partition. From this order an appeal has been taken. We think the order such an one as might work an irreparable injury, and, therefore, the parties may appeal from it.

There were a great many bills of exceptions taken to the ruling of the judge *a quo*, but the views, which we entertain, relative to the issues raised by the pleadings, render it unnecessary to decide them.

The evidence shows that the executor was proceeding to sell a part of the property of the succession under a judgment of this court, to pay a movable legacy and debts, and that the succession was in course of administration. It would seem that the plaintiff ought not to be permitted, thus summarily, to set aside the legal proceedings of the executor under the sanction of this court, and in the lawful discharge of his duties, without first advancing the money necessary to discharge the legacy and debts. C. C. art. 1671.

Nor does the law or equity sanction her attempt to attack her own title, acquired at a judicial sale, provoked by herself, several years ago, and whilst she is in the quiet possession of the property as owner. 7 An. 617, 755; 4 La. 61; 15 La. 520.

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The parties, who might have complained of any irregularities in the sale, have not complained, nay, in this suit they declare their willingness to perfect the title in any way which may be deemed essential. C. C. 1791; 13 An. 34, Suc. of Devereux.

From a careful examination of this case, we conclude that the direct and principal object of this suit was to annul the plaintiff's own title to the Oakland plantation, the value whereof greatly exceeds five hundred dollars. The plaintiff, at the judicial sale, acquired title as a purchaser, and in a contest with the succession relative to the title to said property, she is to be regarded as a stranger to the succession.

The parish court was without jurisdiction, *ratione materiæ*, to try the matters presented in the amended petition. 21 An. 556, Rogers v. Morrison, executor et al.

It is therefore ordered and adjudged, that the judgment of the lower court be annulled, and that there be judgment dismissing the plaintiff's demands with costs of both courts.

Rehearing refused.

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No. 2340.—M. B. IRWIN v. LEVY & DIETER.

The purchase of cotton during the late war by parties residing within the Federal lines of military occupation from persons residing within the rebel lines was prohibited by act of Congress. An agent who left the Federal lines of military occupation and went into the rebel lines and there made purchases of cotton which he shipped to the other side, is not therefore entitled to claim or recover from the persons who received the cotton any compensation for his services or to recover any part of the cotton or the proceeds thereof on account of a contract in relation to the purchase of the cotton, because such contract was illegal.

**A**PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Race, Foster & E. T. Merrick*, for plaintiff and appellee. *Samuel B. and C. L. Walker*, for defendants and appellants.

**TALIAFERRO, J.** The plaintiff sues for \$28,088 04, alleged to be owing him on account of purchases of cotton made by him for the defendants, and which were delivered to them according to an agreement between the parties. The defendants put in a general denial, and in a supplemental answer, admitted that the plaintiff had some transactions in cotton operations with W. D. Smith, whereby he, under contract with Smith, did deliver to him a quantity of cotton at the time stated in plaintiff's petition and the accompanying account; but that these were matters with which the defendants had no manner of connection, and on account of which they are in no manner bound. They further allege that for all purchases of cotton made by the plaintiff on account of Smith, the plaintiff has been fully paid. Judgment was given in favor of the plaintiff for \$5000, and defendants have appealed. From an examination of the record we deduce the following history of this case: In May, 1864, when the unusually high price of

cotton had induced speculations in that staple the defendants, merchants of New Orleans, entered into an agreement with William D. Smith, a resident of the parish of Point Coupée, to purchase cotton on speculation, Smith to have one-third the net proceeds. The plaintiff, it seems, being an active, industrious man, and with some means of his own, was engaged by this partnership to go about through the country and make purchases of cotton, and have it delivered at eligible points for shipment; and for all cotton so obtained and delivered ready for shipment, he was to be paid forty cents per pound, Levy & Dieter to to furnish the money to pay for it. The general superintendence of the business was under the control of Smith. Irwin purchased cotton chiefly if not entirely in the parishes of Point Coupée and Avoyelles, and had it hauled to points on the Mississippi and the Atchafalaya, where it could be put on boats and brought to New Orleans. Levy & Dieter, it appears, did furnish \$21,891, which went towards the payment of the cotton purchased by Irwin and the balance remaining was put by the lower court in round numbers at \$5000 and judgment was rendered for that sum. The defense is placed on two grounds, viz :

*First*—That defendants made no contract with Irwin; and they ignore him altogether as agent or in any other capacity. Second, that the traffic carried on at that time by parties living on opposite sides of the lines between the section of country under Federal control and that in hostility to the government, was unlawful, and any agreement in relation to such traffic null and void.

It is, we think, sufficiently established that the defendants did contract with the plaintiff for the purpose stated. Smith himself testifies that Levy, one of the defendants, introduced Irwin to him at the house of Smith, and that it was agreed between Smith, Levy & Irwin that the latter should buy cotton, to be delivered to Smith, for which Levy was to leave money to pay for the cotton, and that he did leave money at that time to the amount of \$4500, and arranged for Irwin to get other money in the hands of Haggard, and that Irwin was to get forty cents per pound for good cotton delivered on the eastern bank of the Atchafalaya river. This testimony is corroborated by three other witnesses, two of whom prove the delivery of the cotton by Irwin. The defendants allege payment of the indebtedness charged by the plaintiff, and thereby admit that the debt did exist.

*Second*—That the transactions in cotton between these parties being in violation of a prohibitory law, the contract entered into by them is null, and can not be enforced by the courts. The plaintiffs meet this by evidence offered to show that these purchases of cotton were made under special permits issued by B. F. Flanders, a treasury agent at New Orleans, and in conformity with the regulations of the Treasury Department at Washington, authorized to be made by the fifth section

of the statute, approved thirty-first of July, 1861, and the President's proclamation issued in conformity therewith. But a rather vexed question of fact here presents itself, and that is, whether the cotton purchased by the plaintiff in these transactions was really purchased within the lines of military occupation of the Federal armies. For, conceding that the permits were properly issued, and that Irwin was in point of fact resident within Federal lines, which is not clear, still the permits only extended to the purchasing of cotton within those lines. A sharp contest was made by the parties in their evidence on this point. It is probable that the greater part of Irwin's purchases were made west of the Atchafalaya. It is to be inferred from the testimony that during the expedition of General Banks up the Red river there were few if any Confederate troops in that district of country, and some of the purchases, it seems, were made during that time. The interval of non occupation and control of that part of the parish of Avoyelles by rebel forces was brief; for immediately upon the retreat of General Banks all that part of the country with the exception of the port of Morganza, was occupied by them. It is not shown that there were Federal forces stationed at that time (excepting at Morganza), either in the parish of Pointe Coupée or the parish of Avoyelles. The conclusion we are forced to come to from the evidence is, that there was not at the time of these purchases of cotton by the plaintiff such an occupancy by the Federal forces of the section of country within which the purchases were made, as would justify the belief that the transactions took place within the Federal lines, according to the purpose and intendment of Congress by the act permitting, under certain conditions, commercial intercourse in the insurgent States within those portions thereof under the control of the national armies. With this view of the case it results that the traffic of the parties engaged in this litigation being in contravention of a prohibitory law, it must be pronounced that the contracts they entered into in the course of their illicit trade are null and void, and that this suit can not be entertained.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that this suit be dismissed at plaintiff's costs.

WYLY, J., being absent took no part in this decree.

#### ON REHEARING.

LUDELING, C. J. After a careful re-examination of the evidence in this case, the conviction that the cotton was purchased inside the Confederate lines is forced upon our minds. We are, therefore, constrained to adhere to the conclusion heretofore announced in this case; and it is ordered that the judgment rendered in this case on the twentieth of November, 1871, remain undisturbed.

NO. 2612.—MERCHANTS' MUTUAL INSURANCE COMPANY v. NEW ORLEANS MUTUAL INSURANCE COMPANY AND OTHERS, and MERCHANTS' MUTUAL INSURANCE COMPANY v. LOUISIANA MUTUAL INSURANCE COMPANY et al.

In case of the insurance of a cargo of cotton to be shipped from the port of New Orleans to Havre, France, and the vessel arrives at the port of destination with a loss of only a part of the cargo, less than one-half, the rule is that the insured can not claim an abandonment, nor can a loss of a part of the cargo at the port of destination after a portion of it has been delivered at its destined port, be made a constructive total loss by abandonment, however large that part may be.

A reinsurer who has taken a part of the risk from the insurer, may urge all the defenses which the original insurer could urge, when sought to be made liable to the original insurer for losses sustained by the assured; and any of these defenses may be urged by the reinsurer, although the assured may have consented to the constructive total loss by abandonment.

**A**PPPEALS from the Fifth and Seventh District Courts of the parish of Orleans. *Collens, J. A. & M. Voorhies*, for plaintiff and appellant. *Lea, Finney & Miller, M. M. Cohen, Johnson & Dennis* and *A. Robert*, for defendants and appellees.

**TALIAFERRO, J.** These suits were instituted by the Merchants' Mutual Insurance Company against seven other insurance companies on contracts of reinsurance entered into severally by each of these seven companies with the Merchants' Mutual Insurance Company, the plaintiffs in this case. The history of this litigation seems to be this: Dupasseur & Co. were insured by the Merchants' Insurance Company on eight hundred and thirty-four bales of cotton, at the rate of \$200 per bale, on board the ship *Argean* from New Orleans, bound to Havre, in France. The defendants reinsured the plaintiffs for the amounts respectively stated in their separate answers. The vessel arrived safely at the port of her destination and, after discharging a portion of her cargo in sound condition, of which three hundred and twenty-five bales of the cotton insured for Dupasseur & Co. constituted part, took fire, which was ultimately extinguished by letting water into the hold. The remainder of the cargo was discharged in a damaged condition. When the news first reached New Orleans of the occurrence of the accident, the Merchants' Mutual Insurance Company made several advances to the insured for an aggregate sum of \$104,000, subject to a future adjustment. In like manner the reinsuring companies made corresponding advances to assist the Merchants' Insurance Company. In accordance with the usage and practice at Havre, a statement or adjustment of the loss was made by the "Tribunal du Commerce," and by this adjustment it seems the several companies reinsuring profess to have always been willing to abide. By this adjustment it appeared that the case was one of partial loss only. Dupasseur & Co., on their part, held that it amounted to a constructive total loss, and refusing when called upon by the Merchants' Insurance Company to

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refund any portion of the large advances that had been made to them, claimed an abandonment; the loss, as they asserted, having amounted to more than fifty per cent. Suit was brought against them by the Merchants' Mutual Insurance Company. Judgment was rendered in favor of Dupasseur & Co. as in case of total loss, but condemning them to pay the sum of six thousand dollars, being the excess of the advances over the amount adjusted for constructive total loss. The reinsurers were then called upon by the Merchants' Insurance Company to contribute according to their several undertakings in favor of the insurers in order to lessen the burden upon them. This they refused to do, and against four of the companies which engaged in the reinsurance, suit was brought in the Fifth District Court, and against the other three suit was instituted in the Seventh District Court.

In the Fifth District Court the case was tried before a jury of merchants. Four of the companies, it seems, contended that the amounts advanced by them subject to future settlement and adjustment exceeded the sums they were legally bound to contribute, and they set up reconventional demands for the overplus. The other three specified small amounts, which they admit they are bound to furnish to make up the sums they are legally bound to contribute, and which deficits they aver they have always been willing and ready to pay.

Judgment was rendered in the Fifth District Court in favor of the plaintiffs against those admitting they owed balances and for the sums so admitted, and in favor of the Louisiana Mutual Insurance Company on its reconventional demand for the amount alleged to have been in excess of the sum it was bound to contribute. In the Seventh District Court judgment was rendered against the plaintiffs and in favor of the defendants on their respective reconventional demands, the court treating the judgment of the plaintiffs against Dupasseur & Co. as a nullity, and also on the ground that there was not, and under the facts of the case there could not be, in regard to the damage sustained by the ship taking fire, an abandonment and a claim by Dupasseur & Co. for a constructive total loss. From both judgments the plaintiffs have appealed.

The judgment in the case of the plaintiffs, 'The Merchants' Mutual Insurance Company v. Dupasseur & Co. was, by consent of the parties, rendered by the court out of term time and during vacation, viz: on the thirty-first of August, and was signed on the fourth of September. On the trial of the cases now before the court, the introduction of the judgment in question by the plaintiffs, as evidence was objected to by the defendants as being *res inter alias acta*, and that they were not bound by it, not having been parties to it. There was a stipulation in the agreement of the parties that there should be no application made to the court for a new trial. The defendants hold the judgment a nullity



for the reasons assigned, and cite the case of Culver, Simonds & Co. v. Leovy et al., 21 An. 306. It is, we think, clearly shown that the loss sustained by the perils insured against did not amount to fifty per cent. of the value of the cargo, and under the rule of fifty per cent. of the party insured could not make an abandonment. The loss, however, must be more than one-half. Parsons on Insurance, 2 vol. pp. 126 and 127. There is an exception, too, both in regard to ship and goods where the vessel arrives at the port of destination, and any substantial part of the goods insured arrives in safety at its destined port. Nor can a loss of a part of the goods at the port of destination be made a constructive total loss by abandonment, however large that part may be. Parsons on Insurance, vol. 2, p. 159. But it is argued that the abandonment by Dupasseur & Co. was accepted by the Merchants' Insurance Company, and therefore, whether rightfully made or not, could not be brought in question. Whatever might be the effect in such a case between the Merchants' Insurance Company and Dupasseur & Co. we think it would scarcely affect the reinsurers. It seems to be well settled that reassurers are entitled to make the same defenses and to urge the same objections which might be made by the original insurers. 1 Story, 460; 2 Philips, sec. 2173. Reinsurers may have defenses against the original insurer which he could not have against the original insured. 1 Parsons, 299. Reassurers are only liable for what the insurer is legally liable. 2 Philips, sec. 1751.

The several companies who took the reinsurance, it is urged, had knowledge of the pendency of the suit between the insurer and Dupasseur & Co. and they were at liberty to intervene to protect their own interests; that they now make only the same defenses which they might have made in the original suit, and that they might have appealed from the judgment, but which they have not done, and which it is alleged they were invited to do. That the defenses now set up by the reinsured as to the want of right in Dupasseur & Co. to make an abandonment were made by the Merchants' Insurance Company in the suit they brought against Dupasseur & Co. The plaintiffs contend that formal knowledge by notice in writing in matters of commerce and insurance is not required, but that knowledge however required is sufficient; and that the reinsurers had knowledge of the suit brought against Dupasseur, although not notified of it officially. But notwithstanding the reinsurers knew of the pendency of the suit by common rumor, how can they be held bound by a judgment rendered in a suit to which they were in no manner made parties? They were under no contract with Dupasseur & Co.; their obligation was with the insurers to make good to a certain extent a liability that they might incur they were not called in warranty nor cited to appear in the case in any capacity. The invitation given them to appeal and their declining to

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do so did not preclude the insurers themselves from appealing, which it would seem they had no intention to do. They agreed with Dupasseur & Co. to submit the case to be determined during vacation, both parties waiving motions for new trials.

The plaintiffs insist upon the validity of that judgment, and that the defendants are bound by it. We deem it unnecessary to pass upon the question of its validity, as we think the case with the defendants, irrespective of that judgment.

The vessel arrived safely at her port of destination, with her cargo in good condition. The damage and loss sustained by the fire which occurred before the vessel was entirely unloaded was partial, as accurately shown by the investigation and adjustment made by the tribunal at Havre. The amount for which the insurers were liable was far less than that for which they aim to make their reinsurers liable. They surely have no right to make such a demand. We think the judgments appealed from should be sustained.

It is therefore ordered, adjudged and decreed that the judgments herein appealed from, viz: The judgment of the Fifth District Court, rendered in the case numbered 348 on the docket of that court, and the judgment of the Seventh District Court, rendered in the suit numbered 998 on the docket of that court, be affirmed with costs in both courts.

Rehearing refused.

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NO. 2547.—CELESTE J. UMRICH v. ROSETTE E. GROW.

The only question that can be examined on an appeal from an order of seizure and sale is: had the judge *a quo* sufficient authentic evidence before him to authorize the issuing of the writ. Costs incurred in protesting a mortgage note are regulated by law, and must be taxed as such by the court that issues the order of seizure and sale, and authentic evidence of such costs is not therefore essential.

**A**PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Miles Taylor and James Brewer*, for plaintiff and appellee. *John A. Grow*, for defendant and appellant.

HOWELL, J. This is an appeal from an order of seizure and sale, and the appellant makes the following assignment of errors:

*First*—There was no authentic evidence before the judge *a quo* that the plaintiff had complied with the stipulation in the act of sale and mortgage, to have certain judicial mortgages inferior to the one under which the property was sold to defendant, erased "according to law before the maturity of the first note given for the price and before the payment of the same."

*Second*—There was no authentic evidence to prove the notarial fee for the protest (three dollars and seventy-five cents) and the cost of the copy of the act of sale and mortgage (five dollars).

Celeste J. Umrich v. Rosette E. Grow.

*First*—The first ground of error is one which should be made the basis of another form of action and the merits of which can not be examined on this appeal. It is so well settled as to need no reference to authority, that the only question which can be examined on an appeal from an order of seizure and sale, is whether or not the judge had sufficient authentic evidence before him to issue the writ. By the law, the notarial act importing a confession of judgment, together with the note, where one is described in and identified with it, is sufficient. To require authentic evidence of the erasure of a judicial mortgage might deprive the creditor altogether of the right to the executory process; and if it should be true that the judicial mortgages in this instance have not been erased as contended, although defendant has paid nearly the half of its original amount, she is provided with a remedy. The note, on its face, is due.

*Second*—As to the costs objected to, they are regulated by law and declared to be costs of suit, and must be taxed as costs by the court in the same manner as other costs allowed by the court. Acts 1855, p. 163, §§ 4, 11, 13 and 19; R. S., §§ 750, 770.

Judgment affirmed.

Rehearing refused.

NO. 2444.—STATE OF LOUISIANA v. DUBOIS, CAMBRE and COMINGE.

The continuance of a criminal trial can not be claimed by the accused a second time on the ground of the absence of counsel.

In a criminal case, the punishment of which is not capital, the jury may be allowed to separate after they are empaneled.

**A** PPEAL from the First District Court, parish of Orleans. *Abell, J. S. Belden*, Attorney General, for the State. *Ernest Morel*, for defendant and appellant.

LUDELING, C. J. Jules Dubois, John Cambré and Prosper Cominge were indicted for robbery; they were tried and convicted. From the judgment of the court, Prosper Cominge has appealed.

There is no bill of exceptions, no motion for new trial, nor motion in arrest of judgment; but in this court the following assignment of errors is made:

That he was ordered to trial in the absence of his counsel; that a former continuance, granted on the application of a codefendant, is no cause to refuse appellant a continuance on account of the absence of his counsel, and that the court should not have permitted the jury to separate after being empaneled, and, at the same time order the prisoner, who was under bond, to jail. The following is a part of the minutes of the court in the case:

"The accused, Prosper Cominge, and the prisoners, Jules Dubois and

John Cambré, stating that their counsel was absent, and this case having been continued once before on that ground, the court appointed Ernest Morel, Esq., to assist the said Jules Dubois, John Cambré and Prosper Cominge on their trial; and said counsel being present in court accepted the appointment and assisted the aforesaid accused."

We think the ruling correct under the circumstances. It is not impossible the counsel might have not attended by the prisoner's contrivance.

There was no error in permitting the jury to separate, after being empaneled in this case, it not being capital. And the imprisonment of the accused, whether right or wrong, could have had no bearing on the trial of the case.

It is therefore ordered that the judgment be affirmed, with costs of appeal.

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No. 2563.—*M. LARA v. C. T. NASH et als.*

An auctioneer who sells succession property under an order of court and receives the price therefor, is not a depositary for the purchaser. He can not, therefore, be held liable to the purchaser for the return of the purchase money in case the latter failed to receive the goods purchased, unless it be shown that the purchase money is still in the hands of the auctioneer and is not claimed by any one else.

**A**PPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. John M. Bonner*, for plaintiff and appellee. *Hyman, Wallace and Handlin*, for defendants and appellants.

**HOWELL, J.** The defendant Nash, an auctioneer, was employed by J. F. Woodman, executor of F. O. Woodman, to sell certain movable and immovable property of the succession to pay debts, in accordance with an order of the Second District Court for the parish of Orleans, which order named the defendant as the auctioneer. At the sale of movable property, consisting mostly of furniture, that in the use of the family of the executor, was adjudicated to the plaintiff. After some delay and several calls for the money, he paid the price (\$863 75), taking the receipt of the auctioneer. All the articles, it seems, remained on the premises where the sale was made until sold by the sheriff in some other proceeding. The plaintiff sues Nash, the auctioneer, and his official sureties, to recover the sum paid by him, on the ground that Nash received it as depositary.

How or why this property was sold a second time is not explained. The plaintiff purchased it at an auction sale, and about a month thereafter paid the price. It must be presumed he was thus satisfied as to its situation and his control over it. The auctioneer does not seem to have had possession of it, nor been called on for delivery, and we are unable to see upon what principle he can be made responsible to

Laura v. Nash et als.

plaintiff, except perhaps upon a showing that the money is in his hands and claimed by no one else. This has not been done. On the contrary, the auctioneer shows that he has paid a portion to the executor; that the succession owed him a large sum which he has compensated, and that the balance has been attached in his hands in a suit against the said J. F. Woodman. He certainly did not receive the money as the depository of plaintiff, but as the price of succession property sold to pay succession debts, and he is bound primarily to the succession and the court ordering him to make the sale; and the allegation of plaintiff, that the said sale was canceled by the court because the property did not bring two-thirds of its appraised value and was sold again by the sheriff by order of said court, if admitted by the vagueness of the answer, does not change the relation of the auctioneer under the circumstances, to his principal.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of defendants, with costs in both courts.

Rehearing refused.

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No. 3640.—A. ROCHEREAU & Co., Agents, v. MARCEL GUIDRY.

An attachment is void if it is issued by a judge who has no jurisdiction over the case in which it is issued.

**A**PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. C. E. Schmidt*, for plaintiffs and appellees. *Charles Louque*, for defendant and appellant.

WYLY, J. The plaintiffs sued the defendant for rent and for damages in the parish of Orleans, alleging, however, that he is a resident of the parish of St. James; they also attached certain funds belonging to the defendant in the hands of the garnishee, on the ground that he was about to assign and dispose of his property for the purpose of defrauding his creditors. The defendant moved to dissolve the attachment on the ground that the affidavit is untrue; that he was not about to assign or dispose of his property for the purpose of defrauding his creditors; and he also excepted to the jurisdiction of the court, he being a citizen of the parish of St. James.

The court decided that it had no jurisdiction of the defendant, because his domicile was in another parish, but held that it had jurisdiction of the thing attached, and would hold it subject to the order of the court, having jurisdiction of the person of the defendant.

The defendant appeals.

Under article 162, C. P., as amended by act of 1861, the defendant should be sued before the judge having jurisdiction of the place of his

Rochereau & Co., Agents, v. Guldry.

domicile, except in the cases expressly provided by law. The case before us is not within the exceptions mention in the Code of Practice.

The court was, therefore, without jurisdiction to grant any order binding on the defendant, because his domicile was in the parish of St. James.

The attachment, being merely a conservatory remedy, should have been issued by the court having jurisdiction of the case.

It is therefore ordered that the judgment appealed from be annulled, and it is now ordered that the attachment herein be set aside, with costs.

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No. 3305.—M. A. SOUTHWORTH v. CITY OF NEW ORLEANS.

The act of 1870, which makes the respective parishes defray the expenses of recording the abstracts of minors' mortgages, does not impair the obligations of a contract, and is not therefore void on that account.

The expenses of making and registering these abstracts are not debts of individuals, but they are charges imposed by law without the consent of the parties, and the General Assembly is competent to declare that such expenses shall be defrayed by the parishes.

The city of New Orleans being the parish of Orleans, comes technically under the act of 1870, which imposes these burdens on the respective parishes. The recorder is only entitled to charge for one registry of each abstract, although it may contain several mortgages, and not being required by law to give a certificate, he cannot charge for it.

**A**PPEAL from the Sixth District Court, parish of Orleans.  
*Cooley, J. Hornor & Benedict*, for plaintiff and appellant. *George S. Lacey*, City Attorney, for defendant and appellee.

This case was tried by a jury in the court below.

**LUDELING, C. J.** This is a suit to recover the value of services rendered in recording the abstracts of inventories of the property of minors, whose tutors had not been required by law to give bond.

This claim is resisted on the following grounds :

*First*—"By the act of 1869, the expense of recording 'the abstracts' provided for in that statute, was made chargeable to the minor, tutor, or other responsible person, and to the property of the minor; while, by the act of 1870, the fees for such services were required to be paid by the respective parishes in which such services were performed, thereby subjecting the parishes to the liability of discharging the debts of a third party, contracted under the act of 1869, and as a consequence, compelling the tax-payers of the parishes, through an assessment on their property, to pay a debt, which by the law in force at the time it was contracted, rested upon private individuals." This, it is contended, is unconstitutional, because it impairs the obligation of a contract. What contract? What obligation is impaired? Surely there never was any contract between the minors (for whose benefit the Legislature directed the abstracts to be recorded) and the record-

ers and clerks. The act of 1870 directed that the parishes should advance to the clerks and recorders the fees for doing the work imposed on them by law, and look to the property of the minors for reimbursement. We can see nothing in this which impairs the obligation of a contract. It is argued that the Legislature can not make parishes pay the expenses of making and registering these abstracts, because it would be making the parishes pay the debts of individuals. We do not consider the expenses aforesaid properly debts of individuals—they are charges imposed by law without the consent of the parties—and the General Assembly may require that such charges shall be defrayed by the parishes. All the officers of the State and parishes, whose compensations are not fixed by the Constitution, might be paid by salaries fixed by the General Assembly; and thus citizens, who had no litigation in the courts, would be made to contribute to pay the debts of other citizens who had, if they be debts. There is no force in the position.

*Second*—The next objection is that the city of New Orleans is not embraced by the act of 1870, which says the parishes shall pay. The city of New Orleans is the parish of Orleans. Acts of 1870, page 30, section 2.

*Third*—The defendant urges that the act of 1870 provides that the recorder shall charge the same fees as “for other similar services,” and that for the registry of ordinary mortgages, \$1 50 for each is allowed.

If the charge were made thus, the relator contends that his fees would be increased ten fold, as there were many mortgages included in many of the abstracts. This is an error. The law created a mortgage on the property of the tutor in favor of the minors, etc., and the law which required the registry of an abstract of the inventories only provided a mode to preserve the mortgage, and only one mortgage is thus recorded by registering the abstract of the inventory in each tutorship, etc. The law does not require the recorder of mortgages to give a certificate in the matter, and he cannot charge for it. We are of opinion that by the terms “similar services,” the Legislature intended that they should charge the State as for recording mortgages.

There is manifest error in the verdict and judgment in favor of the defendant. The judge *a quo* admits this in refusing to grant a new trial, but he remarks that “the refusal of the motion will facilitate the final decision at once.”

This court has often said that it is the duty of courts to grant new trials when justice requires it. 4 M. 512; 3 N. 101; 4 N. S. 132; 2 La. 306; 15 La. 226; 1 R. 192; 7 R. 56; 10 R. 57; 2 An. 625; 6 An. 753. And a new trial is the proper remedy for an improper verdict. 4 M. 83. *Non constat*, that an appeal would have been taken if the judg-

ment had been such as the judge *a quo* would have approved in this case. A new trial should have been granted in this case.

The evidence shows that 2577 "abstracts" were recorded by the recorder of mortgages; and we think under the law he is entitled to charge \$1 50 for each one.

It is therefore ordered and adjudged that the verdict and judgment in this case be set aside, and that there be judgment in favor of the plaintiff against the defendant for three thousand eight hundred and sixty-five dollars and fifty cents, with legal interest from the first of April, 1870, till paid, and costs of suit.

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WYLY, J., *dissenting*. The plaintiff seeks under the statute of the ninth March, 1870, to compel the city of New Orleans to pay his cost bills for recording the abstracts of the inventory of the property of minors, required to be recorded prior to the first of January, 1870, by act of the eighth of March, 1869. I think the law of the ninth of March, 1870, is unconstitutional, in so far as it compels the parishes to pay the cost bills already due by the minors, for whose benefit the abstracts were recorded prior to the first of January, 1870.

At the time the statute in question was passed, the debts for recording were already due; they were the debts of private individuals; and debts which New Orleans had not contracted, and which in no wise enured to her benefit or advantage.

To compel the city to pay such debts, would be practically the taking of private property for private purposes. New Orleans is a judicial person, and its property is protected by the constitution like that of any other individual.

The State can not take private property for itself without indemnifying the owner thereof; it is not permitted to take it at all for private purposes. It cannot take the property of A to give to B. Why, because the disposition of property belongs to the owner. And the State must become the owner before it can exercise the right of disposition, which is the main element of perfect ownership. And how is the State to get the ownership of private property?

Alone by expropriating it for some public purpose, and in paying the owner its value. If New Orleans be compelled under the statute of 1870 to pay the debts already due the plaintiff by certain private persons for services inuring alone to their benefit, it will be divested of the ownership of its money, which is its private property, without its consent and without any consideration whatever. It will simply be despoiled of its property for the benefit of private individuals.

If the city can thus be held to pay the debts of the individuals named



in the act, why can it not be compelled to pay the debts of every other individual?

And if it can be compelled by the Legislature to pay the debts of everybody, its private property is no longer the pledge of its individual creditors; it becomes the pledge of the creditors of everybody. In effect its property ceases to be private property; the ownership virtually passes to the Legislature, because the latter can freely exercise the right of disposition over it.

And the city can scarcely be considered the owner of the money in its treasury if the Legislature can freely exercise the right of disposition over it. To take money from the treasury of New Orleans to give to the plaintiff because certain persons happen to owe him, is virtually an expropriation of the property of the city for the benefit of a private individual.

The principle involved in this case is one of great importance. On the solution thereof hangs the fate of the city so far as the right to possess property is concerned.

If the Legislature can take money *ad libitum* from the treasury of the city, it can take any other property it may see fit and bestow it on whom it may seem proper.

The city will thus cease to be the owner of property, because the ownership is reposed in the person solely invested with the right of disposition. In my dissenting opinion in the case of the State *ex rel. Hernandez vs. the City of New Orleans*, lately delivered, I had occasion to express my views very fully on this subject, to wit: The right of the Legislature to compel New Orleans to pay a debt never contracted by her, and which in no wise inured to her benefit or advantage.

I will not repeat the argument, nor cite the authorities upon which it was based, but will simply refer to it in support of the position I take in this case.

For the reasons given, I feel bound to dissent from the opinion of the majority of the court.

See Cooley on Constitutional Limitations, page 230; 10 Allen, 585; 13 Wis. 37; 37 Barb. 440.

HOWELL, J., concurs.

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NO. 3929.—THE STATE ex rel. DEZUTTER v. JUDGE OF THE FIFTH DISTRICT COURT OF NEW ORLEANS.

A judge who has dismissed an appeal on the ground that the surety is not good, can not be compelled by mandamus to send up the record. The proper remedy to prevent the judge from executing the judgment is by prohibition. 21 An. 113.

**A**PPPLICATION for a writ of Mandamus. *Leaumont, J.*, respondent. *J. J. Foley*, for relator.

LUDELING, C. J. The relator asks for a mandamus to compel the Judge of the Fifth District Court of New Orleans to send up to this court the appeal taken by him in the suit No. 2210 of the docket of said court, on the ground that he had given a good bond according to law, but which the judge rejected as insufficient.

The record before us shows that a devolutive appeal was taken from a judgment against Dezutter for two thousand seven hundred and fifty dollars damages; that the order for appeal fixed the amount of the bond at one thousand dollars, and that a bond for that amount was executed with two sureties, who divided their responsibility. One of the sureties, the judge *a quo* thought not solvent. We have come to the conclusion that he is a good surety, after a careful examination of the evidence taken on the rule. And we are constrained to remark that the sum of one thousand dollars for a bond for costs to be incurred on appeal would seem to be excessive and unreasonable.

But we have often held that after an appeal has been taken and a good bond has been filed in the case, the remedy to prevent the judge *a quo* from exercising jurisdiction in the case is by prohibition. 21 An. 113, *Johnson v. Judge of the Fifth District Court*.

It is not the duty of the judge to send up the transcript of appeal.

It is therefore ordered that the complaint be dismissed with costs.

NO. 2519.—CELINE SALVANT, wife of F. ETTLE, v. JEAN SALVANT.

The written authorization of the husband to his wife to prosecute the suit is in time, if it is filed before the trial of the exception, that she is not authorized.

The settlement of a tutor's account is purely a probate matter, and the parish court has jurisdiction of all such cases without reference to the amount involved.

**A**PPEAL from the Parish Court, parish of Plaquemines. *William M. Prescott*, Parish Judge. *E. Howard McCaleb*, for plaintiff and appellee. *A. Cazabat*, for defendant and appellant.

LUDELING, C. J. This suit is instituted to oblige the defendant to account for the management of her property as tutor, during her tutorage. She alleges he is indebted to her in the sum of \$1360, with legal interest from fifteenth July, 1854, when he received this amount on her account.

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Celine Salvant, wife of F. Ettle, v. Jean Salvant.

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The defendant excepted on the grounds that he is not sued at his domicile, that the parish court is without jurisdiction, *ratione materie*, the amount in dispute exceeding five hundred dollars, and that the wife is not authorized to bring this suit by her husband. The husband's written consent to his wife to prosecute the suit was filed before the trial of the exception. That is sufficient. C. P. 320; 10 An. 504; Howard v. Copley.

This suit was instituted in the court which appointed the tutor; that is the proper tribunal to compel him to account for his tutorship. 2 La. 57; 2 An. 277; White et al. v. Chancy, 2 La. 271.

The settlement of tutor's accounts is purely "probate matters;" and in such cases the parish court has jurisdiction without reference to the amount involved. "In all probate matters, when the amount in dispute shall exceed five hundred dollars, exclusive of interest, the appeal shall be directly from the parish to the Supreme Court." Article 88 Constitution, and Article 87.

We think the judge *a quo* correctly overruled the exception.

On the merits there seems to be no error complained of by the appellant, and an examination of the evidence satisfies us the judgment appealed from is correct.

It is therefore ordered that the judgment of the parish court be affirmed with costs of appeal.

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No. 3718.—J. M. WELLS v. BERNARD ERSTEIN.

A suit for the settlement of a partnership which has been dissolved cannot be maintained by one of the partners if the other partner shows that a settlement of the partnership has been made.

**A**PPEAL from the Ninth Judicial District Court, parish of Rapides. Orsborn, J. James G. White, for plaintiff and appellee. Thomas O. Manning, for defendant and appellant.

WYLY, J. The plaintiff sues for the settlement of the partnership which he says existed between him and the defendant in a dry goods and grocery business in Matamoras, beginning in August, 1864, and terminating in July, 1865, and in which he alleges he invested \$2800. He also avers that the profits of the said copartnership from its formation to its close were considerable, amounting, as he believes, to about \$2000.

The defense is that the partnership which was formed in New Orleans was illegal, because the shipping of goods to Matamoras was prohibited by the United States authorities at the time; also, that the defendant has long since made a full settlement with the plaintiff,

The court gave judgment for plaintiff for \$1400, and the defendant appeals.

The defense of settlement is a good one. It appears that the defendant made a final settlement with the plaintiff when the partnership ended in 1865, that the plaintiff examined the day book, the only one kept by the defendant, who was intrusted with the sole administration of the partnership, and after ascertaining that there was only \$800 in gold coming to him, accepted that sum, and gave his receipt in full. The written article of partnership between them was then destroyed by mutual consent.

The plaintiff has failed to show that he made this settlement in error, or that the defendant practiced a fraud upon him in obtaining it. We therefore conclude by it:

That the defendant gave Kahnagel an interest in his share of the partnership is no reason for the plaintiff to complain; it caused him no loss. "Every partner may, without the consent of his partners, enter into a partnership with a third person for the share which he has in the partnership." \* \* \* Revised Code, 2871.

It is therefore ordered that the judgment appealed from be annulled and that plaintiff's demand be rejected with costs of both courts.

Rehearing refused.

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NO. 3667.—STATE ex rel. W. HAWKSWORTH v. CRESCENT CITY GAS LIGHT COMPANY.

Where shares of stock in a company have been regularly subscribed for, and the subscriber dies, and his universal legatee claims and is decreed by a final judgment of a court of competent jurisdiction to be the owner thereof, such shares of stock can not be taken by another subscriber, especially if, at the time of the second subscription, the books of the company have been closed by a resolution of the board of directors.

**A** PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. William Grant and Hutton & Grover*, for relator and appellant. *Billings & Hughes*, for defendant and appellee.

LUDELING, C. J. This is a suit by mandamus to compel the defendant to recognize the relator as the owner of fifteen hundred shares of the capital stock of the company, and to permit a transfer to be made thereof on the books of the company, and to issue proper certificates of stock to the transferees.

The defense is substantially that relator is not the owner of said stock, and has no right to make the demands insisted upon by him.

There was judgment against the relator dismissing his complaint, and he has appealed.

The evidence satisfies us that at the time the relator signed his name to the subscription books of the company a second time, it was with

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State ex rel. Hawksworth v. Crescent City Gas Light Company.

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the view of appropriating the stock subscribed for by A. B. Long, which was attempted to be canceled without authority, although with the consent of the executor of A. B. Long, who believed he could cancel this subscription. The universal legatee of A. B. Long, having asserted her rights to this stock, the court adjudged it to belong to her, and no appeal has been taken from that judgment. At the time the relator signed for said second subscription the subscription books had been closed by a resolution of the board of directors, and no subscriptions could lawfully be made at the time. There is no error in the judgment appealed from.

It is therefore ordered that the judgment be affirmed, with costs of appeal.

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#### NO. 3490.—SUCCESSION OF E. CORDEVOLLE.

The courts of Louisiana have the undoubted power and right to aid in carrying into effect the provisions of a will made by a citizen or subject of France, when a portion of the estate of the testator is situated within the State, and to aid in the transmission of the funds of successions within her jurisdiction to the representatives of the succession abroad. This power is based on the broad principle of the comity of nations, but it can not be exercised to the prejudice of domestic creditors.

In this case it appears that the testator resided in Paris, France, where he died, leaving an estate in France under the control of executors appointed by the will. For the administration of the property in Louisiana a dative testamentary executrix was appointed. Under the dispositions of the will the property was required to be reduced to cash as soon as practicable, the same to be invested in particular securities in Paris for distribution. The dative testamentary executrix of the Louisiana estate became the purchaser at the probate sale of some of the property, and refused to pay over the price or account for it in the account of her administration, on the ground that she being an heir had a right to hold on to the purchase money until her rights, as an heir, were definitely ascertained, and then only to account for the difference. Held—That she was bound by the terms of the will, and as the will had directed that all the estate should be converted into cash as soon as possible, and be invested in particular securities, in Paris, for distribution; that the executrix in Louisiana, being an heir, could not on that account retain the purchase money in her hands until the distribution, which was directed by the will to be so invested for distribution, and that she must account for it the same as other purchasers.

A dative testamentary executrix, residing in Louisiana, and having under administration an ancillary succession in this State, which belongs to a foreigner residing in Paris, France, where the principal estate is situated, can not be proceeded against by rule, to sell the balance of the estate in her hands, nor will an injunction issue under a rule taken to prevent her from disposing of the funds or notes on hand.

**A** PPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. L. Castera, S. H. Kennedy and Roselius & Phillips*, for appellants. *A. Pitot, Charles Louque and E. Bermudez*, for appellee.

HOWELL, J. Two appeals are embraced in this record. The first is taken by the widow of the deceased and the Commune di Lavagna from a judgment on their oppositions to the second provisional account filed by Mrs. Commagère, the dative testamentary executrix. The second is taken by the said widow from a judgment on her rule upon the dative executrix, who joins in the appeal by answer.

I. The oppositions are based on seven grounds, five of which are urged before us:

*First*—The account is vague and omits all mention of the purchases made by the dative executrix, the price of which she unlawfully retains.

She withholds the price, because as heir she contends she has the right to do so, until the final settlement of the succession and her portion thereof is definitely fixed, as provided by articles 1343 and 2625, R. C. C., and in this position she is sustained by the judge *a quo*.

Etienne Cordeviolle died in Paris, France, where he had resided many years, where he made his will, and where the principal succession is under administration by executors appointed by the will, and the one here is under the administration of Commagère, a sister of the deceased, as dative testamentary executrix. The whole estate of the deceased is disposed of under special conditions and directions, and it seems that all the legatees have accepted, or propose to accept the legacies bequeathed to them. In the will several annuities are made to persons named, two of which are to take effect at the date of the testator's death. One-third of his estate is bequeathed to his "nearest relatives, subject to the application of the principles of the French law," and two-thirds to the Commune di Lavagna for certain purposes; both of said legacies are subject to the special legacies. It is made the duty of his executors, as soon as possible, to reduce all the property to cash and invest the proceeds in the three per cent. French funds, and to inscribe, in the name of each annuitant, as usufructuary, a title or certificate of such stocks, and in the name of the other parties for the worked property. It is further ordained that these titles or certificates of stocks shall remain deposited in the office of the notary at Paris, who shall be charged with the collection and payment of the income; and further, that his heirs, living mostly in New Orleans, United States, will be notified of the opening of his succession and required to present themselves in person, or by attorney, at the domicile of the executor in Paris, to receive whatever may come to them by succession and give acquittance.

As the rights of Mrs. Commagère are derived through the will, and she has taken an oath to execute its provisions, she is bound herself to conform faithfully to all those provisions, unless they should be violative of the laws of this State. We find in them nothing that is illegal.

In the case of *Mourain v. Poydras*, executor, 6 An. 151, the power and right of the courts of this State to aid in carrying out such provisions and generally to direct the transmission of the funds of successors of foreigners within their jurisdiction to their representatives abroad, on the principles of established comity between nations, were recognized as being no longer an open question; not,

however, to be exercised to the prejudice of domestic creditors. No creditors are asserting any rights in this succession adverse to this doctrine, except those who derive their rights from the will, and by it they must be controlled in the mode of obtaining those rights. It follows that as the will directs all the property to be converted, as soon as possible, into cash, and invested in particular securities for distribution, in Paris, in the manner provided, Mrs. Commagère, whose duty it is faithfully to obey the directions of the will, can not avail herself of that provision of our law in favor of heirs who purchase at succession sales, to retain the price until their portions are ascertained. To do so would, in the circumstances of this case, defeat the will.

We do not undertake to decide in what cases this right of the heirs may be examined, but only that Mrs. Commagère can not do so in this case. It is her duty to place upon the account presented the sale of all the property purchased by herself, the same as if purchased by a third person, and account for the proceeds in the same way. The court, therefore, erred in authorizing her to retain the price. She should have included her purchases in the account even if she had the right to retain the price as claimed, and left the settlement of that question for determination at the proper time. Having been presented, however, in this proceeding, we have passed on it.

The suggestion that she might retain the price because she could have refused to comply with the adjudications on account of the widow's endeavoring to have her mortgage recognized, is without merit. Having made the purchases, and not refused to comply, conceding she had a legal cause of refusal, she must account.

*Second*—The second ground of opposition is to the right of the dative testamentary executrix to commissions. It can not be presumed that the testator made the bequests to her as compensation for her services in administering, as she was not appointed by him. The amount to be allowed can not exceed two and a half per cent. on the whole amount of the estimate of the inventory as prescribed in article 1683 R., C. C.

*Third*—The charge of five hundred dollars by the surveyor, for surveys and plans of the property sold, is opposed as excessive. The testimony of the creditor himself, and another surveyor, does not authorize a charge of more than three hundred and twenty dollars, which, we think, is large.

*Fourth*—The auctioneer's bill of two thousand dollars was opposed as excessive, and was reduced by the judge *a quo* to eleven hundred and thirty-six dollars and thirty cents, to conform to the fee bill as to the commissions on the sales—the said commissions being reduced from eleven hundred and sixty-nine dollars to three hundred and four dollars and seventy-five cents. There should be a further deduction of twenty-five per cent. of the sums charged, as paid to the newspapers, as that

deduction was made by the newspapers. Such deductions inure to the benefit of the principals for whom the advertisements are made. We must here say, we do not perceive the necessity of making out a separate *proces verbal* for each piece of property sold at one and the same sale, occupying about twenty-five pages of the record. It is a useless and unauthorized increase of expense.

*Fifth*—The next item opposed is in these words:

“Attorney’s fees for services rendered since the first account rendered, preparing, attending sale, etc., one thousand dollars.”

The judge below was of opinion, from the size of the record and “the proceedings in this case” before him, that the charge is reasonable. We must say that these proceedings do not impress us with the correctness of his estimate. The petitions for the sales, which are very short, and the contest over the account under consideration (and which we agree with opponents in designating as vague and unsatisfactory), do not appear to us to warrant such a charge. It is not to be supposed that the succession must pay the attorney of Mrs. Commagère for services rendered to her as legatee or heir, but only for services rendered her in her fiduciary capacity, and for such services in these proceedings we think five hundred dollars a fair remuneration.

The account must be amended so as to conform to the views we herein express, and for that purpose it will be necessary to remand the cause.

II. A rule was taken by the widow, pending the foregoing controversy, to compel the dative executrix to sell the property remaining unsold, and file a complete detailed account of her administration, accounting for the revenues and distributing all the moneys arising from the sales made in said succession; to prohibit her from disposing of the money and notes reserved by her except upon an order of court rendered contradictorily with the parties interested, and to produce her bank-book, kept according to law, and in default thereof to condemn her and her surety to pay twenty per cent. on any amount not deposited or withdrawn without authority, and damages.

The defendant in the rule excepted that the demands to forward the money to France, and to distribute it here, are inconsistent; that the question of her right to retain the price is pending, and that the proceeding by rule is not the proper mode to enjoin her from disposing of the funds; and she presented two bank-books.

The district judge being of opinion that, by the will, the assets must be distributed in France; that the dative executrix had already been decreed entitled to retain the price of the property purchased by her, and had filed a satisfactory supplemental account under the judgment on the oppositions, and had filed her bank-books as required by law, made the rule absolute so far only as to proceed with the sale of the



property unsold, and to enjoin her from disposing of any of the funds of the estate, unless ordered by the court, and directing her, upon complying with the foregoing order of sale, to file a full, complete account of her administration.

The widow asks on appeal that her rule be made absolute *in toto*, while the dative executrix asks that the judgment be reversed so far as it makes said note absolute.

We agree with the district judge that the will, being unassailed, must be the law of the succession, and that it requires the proceeds of the whole property to be transmitted to France for distribution; but we have already expressed an opinion different from his on the right of the dative executrix, under the provisions of the will, to retain the price of the property purchased by her. Nor do we agree with him in the opinion that the supplemental account gives a satisfactory statement of the affairs and condition of the succession, property, and funds under administration. It is her duty to carry out the provisions of the will as expeditiously as practicable, and be prepared to account to the representative of the succession in France, when properly called on. We do not, however, consider this rule such a call, its purpose being to some extent inconsistent with the true intention of the testator.

The judgment, which should be rendered on the oppositions to the accounts, it seems to us, will dispose of the foregoing questions, and the rule was therefore unnecessary as to them.

As to the question of enjoining the dative executrix by rule, we think the exception well taken. The law has provided ample remedies by other and more regular means of effecting this object.

It was proper, however, to call on her by rule to produce her bank-book and show that she had deposited all the funds of the succession as required by law. She has, it seems, kept her account with the bank in the names of herself individually and two parties, who are said to be her sureties, instead of in her official name. Article 1150, R. C. C., is very positive and stringent, and a failure to comply with it is attended with sworn penalties. The only amount which the appellant mentions as not having been deposited, is the sum of six hundred and sixty dollars, which, it is asserted in the brief, the executrix was condemned to pay as rent; but we are not referred to the proof of this assertion. The rules of court require such reference to be specially made, and it is quite necessary, when the record is very large, and comprises various matters as in this case. We therefore do not feel justified in condemning the executrix and her securities to pay the twenty per cent. authorized by the above article. Whether or not the failure to keep a bank-book in her "official name," will justify the enforcement of any other penalty, is a question not presented.

It is therefore ordered that the judgment on the oppositions to the

account be reversed, and that this cause be remanded, and the dative testamentary executrix be required, within twenty days from the date, herself to file a full, fair and perfect account of her administration, according to law and the foregoing views. It is further ordered that the judgment on the rule herein be reversed, and the rule dismissed without prejudice. The costs of said rule in the lower court to be paid by the appellant, Mrs. Cordeviolle, and the costs of appeal to be paid by the succession.

Rehearing refused.

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NO. 2401.—JOHN C. BARELLI v. EMILE GAUCHE.

An action to annul a judicial sale of real property, on the ground of irregularities in the proceedings, can not be maintained against the purchaser, unless the parties claiming its nullity have paid or offered to reimburse the purchaser, the amounts of the mortgages resting on the property which he has paid since the purchase. In such a case it is held—that a tender of the amounts thus paid by the purchaser is an essential prerequisite to the prosecution of a suit to annul.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Fellows & Mills*, for plaintiff and appellee. *J. H.asley and Thomas Gilmore*, for defendant and appellant.

**TALIAFERRO, J.** This is an action brought by the plaintiff to recover valuable real estate in the city of New Orleans, bounded by Camp, St. Francis, North and Poydras streets, embracing the ground upon which stands the edifice known as the Moresque Building. This property, it appears, was sold under execution in 1865, as belonging to the plaintiff; the execution having issued on a judgment obtained against him for the sum of seventeen thousand five hundred and eighty-three dollars and forty-nine cents, with interest, by Jamison. The plaintiff alleges that the sheriff's sale, purporting to be an adjudication of the property to the defendant, is null and of no effect; that plaintiff was not thereby divested of title, and that the defendant consequently acquired none. The principal grounds alleged as rendering the sheriff's sale null, are: That no seizure of the property was ever made by the sheriff; that the sale was made after the expiration of the *feri facias*, no duly certified copy thereof having been issued within twenty-four hours after the *feri facias* was returned; that the amount bid at the sale did not exceed the amount of prior mortgages, and no adjudication could legally take place. The answer is a general denial. The defendant avers that, as purchaser of the property sued for, he has paid in extinguishment of the price and in discharge of debts due at the time of the sale by the plaintiff, and bearing mortgage and privilege on the property, all that was legally exigible, a sum amounting to one hundred and forty thousand dollars, and which equity requires the plaintiff should have tendered to the defendant before the institution of this suit.

Barelli v. Gauche.

This plea in bar of the action must be sustained. No tender of the amount paid by defendant is shown to have been made, and this, we think, was essential to enable the plaintiff to prosecute this suit. 6 N. S. 684; 8 N. S. 162, 175, 210; 3 La. 541; 12 An. 251; 21 An. 425, and authorities there cited. Rev. C. C. 1912.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed. It is further ordered that this suit be dismissed at plaintiff's costs.

## ON REHEARING.

Howe, J. Upon further consideration we are not inclined to change the judgment heretofore rendered by us in this case. Gormley vs. Palms; 13 An. 213.

It is therefore ordered that the judgment heretofore rendered by us remain undisturbed.

## No. 2800.—W. W. HILL v. OBER ATWATER &amp; Co.

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A promise to pay the debt of another must be in writing. Two partners engaged in the planting business, are both bound to the merchant who furnishes them with supplies to make the crop for one-half their cost.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Ooley, J. J. Hawkins*, for plaintiff and appellee. *Given Campbell*, for defendants and appellants.

Howe, J. Plaintiff brought suit for a balance alleged to be due him from defendants for proceeds of ten bales of cotton, shipped by him to them in October, 1868.

Defendants filed a general denial, and afterwards a supplemental answer, setting up the existence of a planting partnership in 1866 and 1867 between the plaintiff and G. H. Dunn, the furnishing of supplies thereto by defendants to the amount of \$557 54, the assumption of the whole of this debt by plaintiff and the appropriation by his authorization of the proceeds of the ten bales in question to the payment of this account. They admit a balance due of \$72 15.

After examining the pleadings and evidence as a whole, we are satisfied that the defense has been established as to the half of the supplies furnished the plantation in which plaintiff had an interest with Dunn. But we cannot hold him bound for any assumption of the virile share of Dunn, for which he was not bound as a partner, because there is no written proof of this, his alleged promise, to pay the debt of another. 23 An. 747. His allusion to it in a letter is not clearly a promise. He speaks there of an understanding that he should settle the bill, wishes

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Hill v. Atwater & Co.

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to have a copy of it, and says that after he receives it he will tell defendants what he "will do." In his next letter he complains that the bill thus rendered is incorrect. He never finally told the defendants or any one else in writing what he would do. Charging him with one-half the supplies to Tally Place, the judgment would be for \$350 32, with interest from date of sale.

It is therefore ordered that the judgment appealed from be reduced to the sum of three hundred and fifty dollars and thirty-two cents, with interest from November 6, 1868, and costs of lower court; and that plaintiff pay costs of appeal.

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No. 3651.—Succession of MILTON TAYLOR. Application of J. J. TAYLOR and P. A. T. DUNCANSON to be recognized as heirs.

A judgment which recognizes one person as an heir to an estate, and reserves the rights of all other persons to show their heirship in a legal way, cannot be pleaded as *res judicata* against other persons who afterward claim to be heirs. The fact that such a judgment has been appealed from, and the appeal has afterward been abandoned, does not conclude other persons from asserting their heirship judicially.

**A**PPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. W. W. Handlin*, for appellants. *Labatt & Aron*, for appellee.

HOWELL, J. As stated by the appellee, "the only question presented in this voluminous record is, whether John James Taylor and Phoebe Ann Duncanson are the children of Milton Taylor, and as such entitled each to one-third of the succession. Their pretensions were successfully resisted by appellee, who had previously been, by a final judgment rendered herein, duly recognized as the sole heir of her deceased father, and placed in possession of the succession. From this judgment there was no appeal," and the appellee contends that the petitioners are concluded by it, because they applied for and obtained an appeal therefrom, and afterwards on their own motion in the lower court caused it to be dismissed.

The proceeding taken by the appellee, Mary Jane Taylor, wife of Milton Rogers, to be recognized as sole heir, and put in possession of the succession, was had contradictorily with the public administration alone, and the judgment thereon expressly reserved the rights of any heir at law, the evidence before the court developing the fact that the two applicants now before the court were also children of the decedent. The abandonment of the appeal from the said judgment, after the appellants had instituted this proceeding, did not give to the said judgment more force than it inherently possessed, and not being final as to the petitioners in its terms, has not become so by any act of theirs, or otherwise.

## Succession of Taylor.

In our opinion the evidence which establishes the status of the appellee as the child of the deceased shows with equal clearness that the petitioners herein are also his children. The only contradictory evidence is a statement in a written document of memoranda or instructions to his executors, that the two petitioners are not his children. This, however, appears to us to have been written under the influence of displeasure, and to be outweighed by abundant evidence.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of petitioners, John James Taylor and Phoebe Ann Taylor, wife of Robert S. Duncanson, to recognize as heirs and put in possession, through their attorney in fact, William W. Handlin, of two-thirds of the succession of their father, Milton Taylor; and that so much of the order putting Mary Ann Jane Taylor Rogers in possession of all said succession be annulled. Cost of appeal to be paid by appellee, Mrs. Rogers.

Rehearing refused.

No. 2779.—DR. SAMUEL CHOPPIN *v.* W. B. HARMON and WIFE.

A married woman is not bound either jointly or in solido with her husband for medical services rendered her during her illness.

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**A** PPEAL from the Sixth District Court, parish of Orleans. Cooley, J. B. R. Forman, for plaintiff and appellant. R. & H. Marr, for defendant and appellee.

This case was tried by a jury in the court below.

LUDELING, C. J. This suit was brought to recover \$2000 for medical services rendered to Mrs. Harmon. The husband and wife were both sued, and there was a verdict and judgment against both defendants *in solido* for \$1000. The wife alone has appealed.

The services were rendered to the wife during the marriage, and there is no allegation or proof that the spouses were separated in property. The debt is a community debt, for which the wife is not personally bound. C. C. 2402, 2403.

The husband is bound to furnish her with medical aid when needed. C. C. 120. And it can not be said that the services thus rendered "enured to her separate benefit" in the sense which would render her personally responsible for the debt.

It is therefore ordered and adjudged that the verdict of the jury and judgment of the District Court be set aside, and it is further ordered that there be judgment in favor of Mrs. Mary Harmon against the plaintiff, rejecting his demands against her with costs of both courts.

Rehearing refused.

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NO. 3924—THE STATE ex rel. THOMAS LYNNE v. THE JUDGE OF THE SEVENTH DISTRICT COURT.

The decision of the judge *a quo* on a motion to set aside an appeal on the ground that the surety on the bond is not good, will be reviewed on an application to the Supreme Court for a writ of prohibition, and if the surety is found to be good, the order of the Judge *a quo* dismissing the appeal will be set aside, and the writ of prohibition will issue.

**A**PPPLICATION for a writ of prohibition. *E. Howard McCaleb* and *F. Fuseller*, for relator. *Collens*, Judge, respondent.

HOWE, J. The application for a writ of prohibition in this case raises the question of the sufficiency of a surety on the appeal bond. He is bound for \$2000, and declares under oath that he is worth, over and above his debts, from \$7000 to \$8000; and we think the evidence as a whole supports this estimate.

The fact that one piece of his real estate has been at some date, not fixed, assessed at much less than the price he paid for it, and the further fact that the same piece of property is offered for sale under a mortgage, are not in themselves sufficient to show that this estimate is exaggerated.

Let the prohibition be made perpetual.

NO. 3675.—ALEXANDER McNEIL, DUTTON, subrogated, v. MICHAEL J. HAUCK.

When mortgaged property has been sold under judicial proceedings for the benefit of the senior mortgage creditor, the purchaser may proceed by rule to have the posterior and junior mortgages canceled.

**A**PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. John H. Halsey*, for appellant. *Labatt & Aroni*, for appellee.

TALIAFERRO, J. Dutton being subrogated to the rights of McNeil in a promissory note of Hauck's to McNeil for \$6500, and in a mortgage to secure its payment took out an *alias* writ of seizure and sale and caused the property mortgaged to be sold on the third of April, 1871. A previous order of seizure and sale having been taken out by McNeil, was stayed by the surrender of Hauck in bankruptcy. The *alias* writ was issued on the second of February, 1871, two days after the property mortgaged was released and assigned to McNeil by the assignee in bankruptcy. The seizure was recorded on the eighteenth of February, 1871. The wife of Hauck brought suit against him and obtained a judgment, which was duly recorded on the tenth of March, 1871. There was also, it seems, an act executed before a notary, acknowledging by her husband a general mortgage on his property. This act was recorded on the thirteenth of March, 1871. The sale being made, a rule was taken by Dutton against the wife and the re-

corder of mortgages to show cause why her general and judicial mortgages should not be canceled and erased from the records of the mortgage office on the ground of their being posterior in date to the mortgage under which the property was sold. An exception was taken on the part of Mrs. Hauck to the proceeding by rule against her, as her rights can only be divested by a direct action. This exception was overruled. On trial of the rule, judgment was rendered as prayed for by plaintiff in the rule, and the defendant has appealed.

We think the judgment was properly rendered. The seizure seems to have been regularly made and recorded on the eighteenth of February, 1871, some twenty days before the recording of the wife's judgment. Besides this, it is shown that in the act of mortgage from Hauck to McNeil, Mrs. Hauck intervened and renounced all her rights on the mortgaged property. She seeks to repudiate that act as having been done in error and in ignorance of her rights, but we think unsuccessfully.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

Rehearing refused.

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No. 3767.—L. F. GENERES v. MRS. E. J. FLUKER et als.

The Supreme Court will not revise a judgment of the lower court rendered on a rule to dismiss an appeal on the ground that the sureties are not good, if the evidence taken on the trial of the rule in the lower court is not legally before the appellate court.

Rent due for the use of a plantation cannot be recovered from a married woman, unless it be shown that she rented the place, or authorized some one else to rent it for her; nor will an attachment lie against her property to compel the payment of the rent.

**A** PPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Posey, J. Favrot & Lamen*, for plaintiff and appellee. *B. E. Chaney*, for defendants and appellants.

LUDELING, C. J. A motion has been made in this case to dismiss the appeal on the ground that the sureties are not good for the amount of the bond. A suspensive appeal alone was taken, and no amount for the bond was fixed by the judge. When the bond was filed in the clerk's office, a rule was taken by the plaintiff against the defendants to show cause why the bond should not be rejected. The rule was tried before the judge, who received the bond; and the appellee insists here that the appeal should be dismissed, as the evidence taken on the trial of the rule is in the record, and it shows that the bond was not a good bond. The evidence taken on the trial of the rule is improperly in this record, and we can not revise the judgment of the district judge in a matter not properly before us.

The motion to dismiss must be overruled.

This is an action to recover the rents of a plantation for the years

1870 and 1871, and the plaintiff obtained an attachment against defendants' property under the act of 1863, on the ground that they were about to dispose of their property to defraud him. The objections urged by way of exception to the attachment are without any force, and the judge *a quo* correctly overruled them. The evidence supports the claim for rent against A. W. Fluker, but not against his wife. There is no evidence that she ever rented the property or authorized her husband to do so for her.

It is therefore ordered and adjudged that the judgment of the lower court against Mrs. E. J. Fluker be set aside and annulled and that the attachment against her property be dissolved with costs.

It is further ordered and adjudged that her rights to sue for damages be reserved to her; and that in other respects the judgment of the lower court be affirmed, appellee paying costs of appeal.

Rehearing refused.

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NO. 2247.—B. LETZLER v. B. W. HUNTINGTON.

A person who causes the arrest and imprisonment of another, without showing probable cause for his conduct, is liable in damages, and the acquittal of the person arrested after a trial or an examination, is presumptive evidence of want of probable cause for the arrest.

**A**PPEAL from the Fifth District Court of New Orleans. *Leaumont, J. Braughn & Buck*, for plaintiff and appellee. *M. Grivot*, for defendant and appellant.

This case was tried by a jury in the court below.

**HOWELL, J.** The defendant has appealed from a judgment rendered on the verdict of a jury against him for damages for false arrest and imprisonment on a charge of larceny of certain cotton wrecked in Mobile bay and brought to this city on plaintiff's schooner.

The defendant's counsel objected to a copy of the affidavit made by defendant, because it was not certified as a true copy by the Recorder, and was not an affidavit for larceny, as charged in the petition, but for the conversion of the cotton, which belonged to the wreck of a certain steamer.

The form, "a true copy," signed by the Recorder, is a sufficient certificate. The second objection goes to the effect and not the admissibility of the document.

The objection to the second document attached to the former, as an affidavit of the officer making the arrest, should have been sustained, as it was unsigned.

The evidence establishes the arrest, imprisonment and discharge of the plaintiff, and that the defendant was the prosecutor. It also shows



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 Letaler v. Huntington.
 

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that the plaintiff bought the cotton in Ocean Springs, Mississippi; that he was a man of good character; that the defendant made the affidavit, after having been informed on this subject, expressed his regret, and said he would not make it; that the examination of plaintiff before the Recorder was continued from time to time for a month, to enable the defendant to procure evidence to sustain his charge, and that plaintiff, who resided and did business in Ocean Springs, was put to great expense and inconvenience on account of this prosecution.

Under the circumstances we think plaintiff has shown all that is essential to maintain his action for damages, on account of an illegal prosecution and imprisonment without probable cause.

Judgment affirmed.

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NO. 3860.—WIDOW DE ST. ROMES *v.* CARONDELET CANAL AND NAVIGATION COMPANY. NO. 3861.—WIDOW DE ST. ROMES *v.* CARONDELET CANAL AND NAVIGATION COMPANY.

A judgment between the same parties on the same cause of action is only *res judicata* as to the questions actually passed upon in the first judgment. So that questions urged in the first judgment and not passed upon by the court, may become the basis of another suit without being defeated by the plea of *res judicata*.

A continuous resistance to the enforcement of a judgment interrupts prescription from running against the action of nullity. C. P. 612.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Victor de St. Romes*, for plaintiff and appellant. *H. D. Ogden*, for defendant and appellee.

**TALIAFERRO, J.** In the year 1859 the Carondelet Canal and Navigation Company obtained two judgments against the Widow de St. Romes, one on the seventh of March, and the other on the tenth of November following. Before the expiration of ten years, suits were brought to prevent the judgments so obtained from being prescribed. The defendant in those suits, plaintiff in the cases now before us, set up in defense that she had never been legally cited in the original suits, and that she had never authorized any one to sign the obligations upon which those suits were predicated. Upon these issues raised in the action to revise the judgments the decision was adverse to the defendant, and she appealed. The judgment was confirmed on appeal. 23 An., 437. In due time executions were taken out on the original judgments, and the Widow de St. Romes took out injunctions to restrain the seizure and sale of her property and set up the nullity of the judgments obtained against her in 1859 on the following grounds: That the judgments were rendered without citation to her. That no person was authorized by her to subscribe to the capital stock of the company on her account, and that she did not subscribe herself nor au-

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Widow de St. Romes v. Carondelet Canal and Navigation Company, etc.

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thorize an agent to subscribe for her. Judgment was rendered against the plaintiff dissolving the injunction with one hundred and twenty-five dollars for attorney's fees as damages in favor of the defendant, and the plaintiff has appealed. The defense is *res judicata* and prescription. In the suit to revive the judgment of the defendant against the plaintiff the question as to the irregularity of the original proceedings on account of the want of citation, this court deemed it unnecessary to decide. The plea of *res judicata*, therefore, so far as relates to the want of citation in the original suit, cannot apply. Neither is the action to annul prescribed. The plaintiff has opposed throughout the execution of the judgment she seeks to annul, and has not debarred herself the right of action to annul by suffering the judgment against her to be executed. C. P., 612.

There was no evidence introduced on the question of want of authority of the agent Duges. In regard to the time of citation in the original suit the plaintiff and her two sons testified. The plaintiff herself swears that no citation was served upon her; that at the time when it is alleged to have been served she was confined to her room by sickness, and was most of the time in bed. The testimony of the two sons is of a negative character. One of them said it was physically impossible for the deputy sheriff to serve the citation personally upon the plaintiff, but he gave no facts tending to show why it was physically impossible. It is shown that the officer who received the citation has been dead ten years or more. The return upon the citation is shown to be in his handwriting, and it recites that service was made on the plaintiff in person. A sheriff's book was produced in which an entry was shown of corresponding date with the return on the citation, and this entry recites that service was made in person on the plaintiff at her domicile. The plaintiff admits that she received notice of judgment in 1860.

The evidence on the part of the plaintiff does not, in our opinion, overcome that exhibited by written instruments. The presumption is that the officer's return correctly sets forth facts. It is supported by the entries in the sheriff's book, in which was noted the service when made, and that it was made in person on the plaintiff, the date corresponding with the date of service as stated in the return. The plaintiff is a woman advanced in life, and the testimony in the record in regard to other facts renders it not improbable that her memory of events that passed twelve years ago may in some instances be at fault. At all events the evidence on her part falls short of making out a case that would authorize the annulment of the judgment she complains of.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

Rehearing refused.

State ex rel. Luling v. Judge Fourth District Court.

## No. 3915.—STATE ex rel. F. A. LULING v. JUDGE FOURTH JUDICIAL DISTRICT COURT, Parish of St. Charles.

24	333
49	1211
24a	333
50	1050

Where the return day for an appeal has been inadvertently fixed on a non-judicial day (Sunday) the appellant is entitled to the whole of the next day to file his appeal.

A transcript of appeal is considered as filed in the appellate court from the moment that it has been deposited with the clerk, although the formal indorsement thereon was not written until the following day.

**A** PPEAL from the Fourth District Court, parish of St. Charles. *W. O. Denegre*, for relator. *R. Beauvais*, Judge, for respondent.

**WYLY, J.** This is a proceeding by mandamus to compel the Judge of the Fourth District Court, parish of St. Charles, to execute a judgment, on the ground that the appellant had failed to file the transcript of appeal within the legal delay.

It appears that the return day, as extended, was the twenty-eighth of February, which was Sunday. The next day, between six and half-past six in the evening, the attorney of the appellant deposited in the clerk's office the transcript, but the clerk being absent the filing was not indorsed thereon till the succeeding day.

The transcript being deposited in the proper office, within office hours, must be regarded as filed, although the formal indorsement thereof was not written till the next day.

The return day occurring on Sunday, we think the appellant was entitled to the whole of the next day to file his appeal.

In view of the facts stated, we think the judge did not err in declining to execute the judgment pending on a suspensive appeal in this court.

Let the mandamus be disallowed and the petition be dismissed at the cost of the relator.

## No. 2544.—VOR. MAIGNAN &amp; F. LABORDE v. NEW ORLEANS, JACKSON AND GREAT NORTHERN RAILROAD COMPANY.

A common carrier who undertakes to carry freight from one point to another is responsible for the delivery of the goods at the port of destination. A mere notice by the carrier to the consignee, that his goods are landed, is not sufficient to discharge the carrier in case of loss.

**A** PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Whitaker & Rice*, for plaintiffs and appellants. *L. E. Simonds*, for defendants and appellees.

**TALIAFERRO, J.** This is an action to recover from the company \$577 50, with interest, the value of four barrels of whisky, brought over their road from Canton, in the State of Mississippi, to New Orleans, and alleged by plaintiffs never to have been delivered to them. The defendants admit that they transported for the plaintiffs

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Maignan & Laborde v. New Orleans, Jackson and Great Northern Railroad Company.

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fifty barrels of whisky to New Orleans as set forth by them, but aver that they made due delivery of the same, and deny that they are liable to plaintiffs in any manner. There was judgment in the court below in favor of the defendants, and the plaintiffs have appealed.

The case depends entirely upon the question of delivery. It seems that the fifty barrels of whisky arrived at the New Orleans depot on Saturday. An employe of the plaintiffs testifies that he noticed in the Monday morning's newspaper that the whisky had arrived on the previous Saturday; but that no notice of its arrival had been given by the company in accordance with their usual custom, and that he only learned of its arrival by seeing the statement in the newspaper; that an order was sent for the whisky, directions given for payment of the freight, and a gauger dispatched to gauge the liquor; that it was too late on Saturday evening after the gauging was got through with to receive the whisky, and the hauling of it away was not commenced until the next morning, when several drays were put in requisition for that purpose; that about 3 o'clock P. M., of Tuesday, forty-five barrels had been taken away, and when a drayman returned for the remaining five barrels, only one of them could be found. It is shown that the whisky had been stored in the warehouse or storeroom of the company. The clerk or cashier of the company at the depot, whose business it seems was to attend to the delivery of freight, testifies that when the drayman came into his office and presented the order for the whisky it was raining hard, and that he could not at the time attend to it himself, but sent one of the watchmen to show the draymen the whisky they were to haul. This watchman testifies that by instructions from the clerk he went with the draymen, counted the barrels, finding the full number there, and said to them: "There is your whisky." The clerk further testified in regard to delivery, that this had been the mode of delivering freight at the depot up to the time of the delivery of this lot of whisky to the plaintiffs; that his practice had always been to go out with a person having freight, show him his lot, count the parcels, and say: "There is your lot; take it." That he considered that a delivery, and afterwards abandoned the goods and had no more to do with them. In answer to questions by counsel, he said: "We count the lot to him still, but we work differently now." Being asked if, when a drayman took away two or five barrels, it was customary to get a receipt for them, he answered: "No, but I have done it since, just on account of that circumstance"—alluding to the difficulty that arose from the loss of the four barrels of the plaintiffs' whisky.

Much of the testimony in this record is irrelevant. That portion of it bearing immediately upon the only question in the case does not in our opinion show such a delivery as will exonerate the company as

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common carriers from liability for the loss shown to have been sustained by the plaintiffs in this case. By the subsequent adoption of a stricter usage in regard to delivery the company seems to have brought itself under the rule that appears to be the one now generally prevalent, that the consignee should have time and opportunity to remove the goods by the exercise of the proper watchfulness, before the responsibility of the carrier ends. Redfield on the Law of Railways, vol. 2, pp. 55, 56 and 57.

We think the judgment appealed from erroneous. It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed. It is further ordered that the defendants deliver to the plaintiffs the four barrels of whisky, shown to have been missing through the fault of the defendants, or pay the plaintiffs the value thereof, viz: five hundred and seventy-seven dollars and fifty cents, with five per cent. interest thereon, from judicial demand, and all costs of suit.

Rehearing refused.

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NO. 2539.—JOHN MARKS & CO. v. SIMON HERMAN.

The holder of a promissory note who wishes to hold an indorser thereon, must give him notice of the failure of the drawer to pay at maturity.

A person who is bound unconditionally on a promissory note, is not entitled to notice of non-payment by the drawer.

**A** PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Cotton & Levy*, for plaintiffs and appellees. *Cooley & Phillips*, for defendant and appellant.

HOWELL, J. The motion to dismiss this devolutive appeal on the ground that a suspensive appeal having been dismissed because the bond was not payable to the clerk, the appeal must be considered abandoned, comes too late, more than three days having intervened between the filing of the record and the motion.

The suit was brought on two notes payable on demand to the order of defendant, and by him specially transferred to plaintiffs three years after their date, and protested about two years thereafter.

The defendant denies that he is liable as an indorser, and if an indorser, then that demand was not made in due time or legal notice served.

It is shown that at the date of the said transfer defendant was indebted to plaintiff in the amount of the two notes. The evidence of the transfer is in the following words:

"I transfer the within note to J. Marks & Co., or order, payable on demand.

"New Orleans, June 13, 1864.

(Signed)

S. HERMAN."

The question arises, how was the defendant Herman bound? The plaintiffs contend that he undertook the payment of said notes, when demand *upon him* should be made. If this be so, he was the unconditional obligor, and protest was unnecessary.

But we do not so understand his engagement. We regard the form in which he made the transfer as recognizing that the makers of the notes were bound on demand, and if they failed to pay when demand should be made, and due notice be given to him, he would be bound. That is, he became indorser, entitled to notice when demand should be made on the makers. 20 A. 546.

The plaintiffs have evidently been guilty of laches in making the demand, and giving the requisite notice, nearly two years having transpired before the demand and protest (admitting that the notice was in legal form), and no reasonable cause of the delay shown. We must conclude that the defendant has been discharged as indorser. 20 An. 546; 16 An. 179.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of defendant with costs in both courts.

Rehearing refused.

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No. 3685.—RICHARD T. VINSON, Administrator, v. NUMA VIVES.

The payee of promissory notes, given for the price of a plantation, is not guilty of fraud in making a compromise with the holder thereof, whereby he obtains a reduction of the amount predicated on a depreciation of value on the property sold, on account of the casualties resulting from a state of war.

Where the wife has died after a sale by the husband of a plantation, the property of the community, but before payment has been made, the purchaser who has no knowledge of her death, is not guilty of fraud if he compromises with the husband, as vendor, by taking up his notes and giving others in their place for a less amount.

The husband, as one-half owner in his own right of community property which he has sold before the dissolution thereof by the death of his wife, and having the usufruct of the other half of the community, has the right to collect the notes given for the price of the sale.

**A** PPEAL from the Fifteenth Judicial District Court, parish of Assumption. *Beattie, J. J. B. Whittington*, for plaintiff and appellant. *Nichols & Tolse*, for defendant and appellee.

WYLY, J. In 1862, James B. Vinson sold to Numa Vives his plantation in the parish of Assumption, on credit, for \$41,000, and moved to the parish of Caddo, where his wife died in 1864.

In December, 1865, James B. Vinson, having in his possession the four promissory notes made by Vives, representing the price of the land, amounting in the aggregate to \$41,000, called upon Vives for a settlement; the latter, owing to the disasters of the war, was unable to pay him, but was willing to return the property. Vinson, how-

over, proposed a compromise, which was accepted, and the agreement was reduced to writing in an act under private signature. By this agreement the original debt was not to be novated, but only reduced to \$24,000, Vives paying, in lieu of the original notes, \$10,000 cash, and executing his six promissory notes for \$2,333 33 $\frac{1}{3}$  each, payable in the month of March of the years 1867, 1868, 1869, 1870, 1871 and 1872. On the 27th February, 1866, this agreement was carried into effect, as appears by the act passed by Shannon, notary. The \$10,000 were paid, and the six notes were executed, the same being secured by the original mortgage, the act reciting that no novation was intended, and that said payment and said notes were given in lieu of the original notes, amounting to \$41,000, which were then surrendered to Vives.

All of these six notes have since been paid, except the last two, maturing in March, 1871 and 1872.

At the time of this compromise no one was appointed to represent the succession of Mrs. Vinson, wife of James B. Vinson, who died in 1864.

Vinson was confirmed as natural tutor in 1867, all the heirs being minors but the plaintiff, Richard T. Vinson.

On the 20th of April, 1870, Richard T. Vinson was appointed administrator of his mother's succession. In August following he instituted this suit to collect from Vives the full amount of the original notes, \$41,000, and to foreclose the mortgage, alleging that, as partner in community, one-half of the amount thereof belonged to his mother, and her succession being unrepresented, his father was wholly unauthorized to make the compromise in 1865, whereby the original notes were surrendered to Vives; that said compromise was entered into for the purpose of defrauding the creditors and heirs of their rights, resulting from the community hitherto existing between James B. Vinson and his deceased wife, and that the fact that said Vinson was acting without authority was well known to the defendant, Vives, who knew of the death of Mrs. Vinson prior to the agreement and the passing of the act before Shannon, notary.

The court rejected the demand of the plaintiff, and he has appealed.

It appears that, owing to the disasters of the war, the property which Vives in 1862 agreed to pay \$41,000 for, was reduced to about \$6000 in value when the compromise was made, in December, 1865, and all that Vives owned besides was \$10,000 in cash. At the time of the compromise, therefore, Vives possessed \$16,000 in property and money, and owed the notes, amounting to \$41,000, exclusive of interest.

By the compromise James B. Vinson, the payee of the notes, received in cash \$10,000, and also six notes maturing at different dates, all

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amounting to \$24,000. We do not see how Vives committed a fraud in entering into the compromise in December, 1865. By it he paid and agreed to pay \$24,000 for property which he was willing to surrender to his vendor, and which it is shown was only worth \$6000 at the time. J. B. Vinson is not a party to the suit, and we do not find any fraud as to him, if such could be considered in this proceeding. From the evidence we are satisfied that Vives was not aware of the death of Mrs. Vinson at the time he made the compromise. Her succession was not opened till nearly five years thereafter. Vinson was the payee and holder of the notes. We think Vives had the right to pay the notes or make any *bona fide* settlement he could with the holder and payee.

The maker of negotiable paper should be protected in the settlement he has made in good faith with the holder, in whom the legal title appears to be vested. See authorities collated in Hennen's Digest, page 180, sections 1 and 5.

Vinson had the right to collect the debt also, because he was the owner of one-half, and usufructuary of the other. 11 An. 760; 19 An. 15; 20 An. 159; 22 A. 446.

But the plaintiff contends that if he had the right to collect the debt he did not have authority to remit a part of it. This question would more properly arise in a controversy with Vinson for a settlement of the community. He had, however, the right to remit the whole of his part of the claim, subject to any attack his creditors might institute in their name for fraud, within the period prescribed by law. The amount abated was less than the amount due him individually. Of this the plaintiff has no cause to complain.

In *Gilmore v. Bailey*, 12 An. 562, where a note for paraphernal funds of the wife was merged in a judgment in the name of the husband, it was held that the judgment might be compensated by any debt equally liquidated, due by the husband to the judgment debtor; that knowledge on the part of the judgment debtor that the note on which the judgment was obtained was the property of the wife, would not prevent the compensation from taking place at any time while the legal ownership of the judgment remained in the husband. "And the reason of the rule," said the court, "is this: A judgment debtor is not to be subjected to the hazard of a litigation between the judgment creditor and a third party claiming the ownership of the judgment, which, after all, may prove unavailing; but he may at once relieve himself by making payment to him who holds the judgment rendered upon the commercial paper, and which has the effect of *res judicata* against all others."

So the maker of commercial paper is not to be subjected to the hazard of a litigation between the payee and a third party claiming



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the ownership, which, after all, may be unavailing; but he may at once relieve himself by making settlement with him in whom the legal title appears to be vested, and who is the holder.

"The defendant has no right to inquire whether the plaintiff, in whom the legal title appears to be vested, be an agent or the real owner of it, unless by a fictitious assignment it be attempted to deprive him of substantial grounds of defense which he has against the true owner." See cases cited, section 5, Hennen's Digest, page 180.

Judgment affirmed. Rehearing refused.

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3777.—JOHN FRAZIER v. SAMUEL PARSONS, Sheriff.

A sheriff who himself, or through any of his deputies, under the pretense of enforcing a civil process, illegally arrests and imprisons a citizen, and while holding him under duress, illegally seizes and takes away and disposes of his property, is liable to a civil action in damages, the measure of which will be governed by the aggravation and unprovoked character of the conduct of the sheriff or deputy.

**A**PPEAL from the Ninth Judicial District Court, parish of Natchitoches. *Orsborn, J. Pierson & Levy*, for plaintiff and appellee. *Jack & Pierson*, for defendant and appellant.

LUDELING, C. J. This is a suit against the sheriff of Natchitoches, for the value of a lot of cotton seized by his deputy, in January, 1871, under a writ of sequestration, in the suit of *W. P. Cannon v. Thomas Burch*, and for damages for the tortious, illegal and oppressive acts of said deputy.

The defendant admits the seizure of the cotton and the arrest of the plaintiff; and he sets up the writ of sequestration as his authority for taking the cotton, and the alleged threats of the plaintiff to resist the seizure as his justification for arresting the plaintiff. There was a verdict in favor of the defendant, who remitted the damages allowed him, and the plaintiff has appealed. The testimony of the witnesses is conflicting on several points, but the following facts seem to be well established:

That Thomas Burch leased a piece of land from W. P. Cannon, for which he was to give Cannon one-half of what he raised on the land; that Cannon advanced to him thirty-seven dollars and fifty cents to make the crop, and that Burch made about six thousand pounds of seed cotton. That Burch hauled the cotton to Frazier's plantation, and sold and delivered it for a fair price, to Frazier, who bought in good faith. That subsequently Cannon sued Burch for the half of the cotton and for the amount advanced, and obtained a writ of sequestration against Burch, in order to prevent him from disposing of the cotton. The writ was placed in the hands of the deputy sheriff, who went to Frazier's plantation to seize the cotton—and he says he did

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seize it—and that he appointed one Ryals as keeper, who, however, refused to act as keeper for the sheriff, as he was the agent of Frazier, the plaintiff in this suit. Several days afterwards the deputy sheriff returned to the place—Frazier was then on the place—the deputy sheriff told him he had come to take or seize the cotton belonging to Mr. Cannon. Frazier said there was no cotton there belonging to Cannon, that he had bought the cotton from Mr. Burch and he had paid him for it, and if any one had any right to it, he could sue him for it. The deputy sheriff persisted in seizing and taking the cotton, and angry words passed between them. The deputy sheriff swears that Frazier threatened that there would be bloodshed if any one attempted to enter the house to take the cotton. Frazier swears to the contrary. He is corroborated by several of the laborers who were present, who state they heard what passed between them. And Ryals, the agent or overseer, also declares he heard no threats of violence made by Frazier. Swan, who had come with the deputy, testifies that Frazier said the cotton should not be taken, except by force which he would not be able to resist. Thereupon, the deputy sheriff rode off, leaving Swan behind, and after nightfall he returned with from ten to fifteen men, several of them having shot-guns and some revolvers. They were noisy and boisterous, and some of them at least were under the influence of liquor. Frazier was sitting by a fire indoors, and he was sent for by the deputy sheriff. When he went out of his house, he was arrested by the deputy sheriff, who searched him and then placed him under guard. He was kept under arrest all night and until about noon of the following day. In the meantime the cotton was hauled off. It was ginned, baled, shipped to New Orleans by the sheriff, and sold for his account. The sheriff accounts for the proceeds of the cotton thus :

Dr.	
To costs of suit.....	\$150 50
To cash paid plaintiff (Cannon).....	152 85
Total.....	\$303 44
Cr.	
By cash on shipment of 3 bales cotton, marked S. P.....	\$ 85 35
By net proceeds of cotton in New Orleans.....	218 09
Total.....	\$303 44

Thus, the half of the cotton, which Frazier had an unquestioned right to, subject only to the privilege of Cannon for \$37 50, at the most, has been absorbed in paying costs in a suit to which he was not a party. Under a writ of sequestration against Burch, property acquired in good faith by Frazier has been forcibly taken from his possession, sent out of the jurisdiction of the court and sold without an

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order of court, and the proceeds thereof has been most arbitrarily and illegally distributed by the sheriff. For protesting against the sheriff taking his property, without any process against him, the plaintiff was outrageously insulted and arbitrarily and illegally arrested and deprived of his liberty for about eighteen hours.

Suits in damages against sheriffs, whose duties are delicate, are cautiously entertained, lest the efficiency of the law be impaired ; but the declaration in the constitution, that "the right of the people to be secure in their *persons*, houses, papers and *effects*, against unreasonable searches and *seizures*, shall not be violated," would be a mockery if courts should sanction such a latitude of construction, as is invoked by the defendant for the writ under which he claims to have acted, or if they failed to inflict exemplary damages for the wanton abuse of the personal liberty and private rights of property in cases like the present. For the net proceeds of half the cotton, attorney's fees and exemplary damages, we think the plaintiff should recover from the defendant one thousand dollars.

It is therefore ordered and adjudged that the verdict and judgment rendered thereon be set aside, and that there be judgment in favor of the plaintiff against the defendant for one thousand dollars and costs of both courts.

Rehearing refused.

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NO. 3784.—MARY J. WALTERS, Executrix, *v.* ANDREW CRUIKSHANK.

An agent is only bound personally when he contracts without the authority or sanction of his principal. But if, as in this case, the principal subsequently ratifies the contract made by his agent, then, and in such case, the agent is not personally bound.

**A** PPEAL from the Ninth District Court, parish of Grant. *Orsborn, J. R. J. Bowman*, for plaintiff and appellant. *R. A. Hunter and G. L. Hull*, for defendant and appellee.

WYLY, J. The motion to dismiss this appeal because the record contains a document not offered in evidence is frivolous and can not prevail.

The plaintiff appeals from a judgment rejecting her demand based on the draft of the defendant for \$799, which was duly protested for non-payment, and proper notice thereof given to the defendant.

The defense is that the plaintiff is not the owner of the draft, that it was given to the deceased Wm. Walters, merely for collection ; that the drawer owed the defendant for rebaling some cotton, and in order to collect the debt the defendant gave Walters the draft, the latter undertaking to make the collection for him. It is also urged in defense that if the defendant is indebted to the plaintiff, the consideration of the debt was Confederate notes.

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Mary J. Walters, Executrix, v. Cruikshank.

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The defendant also claims in reconvention \$1000, the amount due by Cooper for rebaling the cotton, on the ground that he was employed by Walters as Cooper's agent, and as Cooper has not paid him, Walters is liable. It is not shown that Walters was unauthorized to make the contract as agent for rebaling Cooper's cotton in possession of the defendant. It is shown that Cooper ratified the contract before it was carried into execution and subsequently paid part of the debt.

It is well settled that the agent only becomes bound where he contracts without authority from his principal. Where he does not bind his principal he binds himself. Otherwise he might with impunity defraud those dealing with him in his fiduciary capacity. The contract of Walters for rebaling Cooper's cotton was ratified by Cooper, consequently no obligation against Walters arose therefrom. There is nothing, therefore, in the reconventional demand. The statement that the defendant merely gave the draft to Walters for collection is highly improbable; it is not in the usual course of dealing, and from the evidence we are satisfied it is not true.

The only evidence offered to support it is the deposition of the defendant himself, which is contradicted by the witness Bringham. He can not escape the obligation of his contract on such meagre evidence. As to the Confederate money defense, we will remark it is not supported by the evidence in the record.

Let the judgment appealed from be annulled, and let there be judgment for the plaintiff for seven hundred and ninety-nine dollars, with five per cent. per annum interest thereon, from twenty-second of March, 1867, and costs of both courts.

Rehearing refused.

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NO. 3253.—JOSEPH H. WILLARD et al. v. JOHN H. PEXTON.

A succession sale of community property made to pay the debts of the estate can not be annulled because minor heirs have an interest in the succession, of which they have not been divested, according to law.

**A**PPEAL from the Fourth District Court, parish of Orleans. Théard, J. *E. K. Washington* and *M. C. Dunn*, for plaintiffs and appellants. *Wooldridge & Thomas*, for defendant and appellee.

**TALIAFERRO, J.** This is a petitory action to recover from the defendant twelve lots of ground with the buildings and improvements thereon, situated in the city of New Orleans, bounded by Magazine, Camp, Aline and Delachaise streets. The plaintiff also claims rent for the use of the property, from the year 1867.

The defendant denies the allegations of the plaintiff, avers that he is the *bona fide* owner of the property, having acquired a legal title

thereto by purchase at a probate sale and payment of the price of adjudication. He alleges that since he became owner of the property he expended five thousand dollars in repairs and improvements made upon the property. He prays, in case of eviction, that before the plaintiffs are permitted to take possession of the property they be required to refund to him the price paid, viz.: \$17,225 and \$5000 costs of improvements, etc.

There was judgment in the court below in favor of the defendant, and the plaintiffs have appealed.

The pretensions of the plaintiffs are based upon the assumption that nullity resulted from the proceedings by which the property in question was sold, the plaintiffs being at that time minors, and that their rights in the property derived from their father have never been legally divested. The property was community property acquired during the marriage of Peter H. Willard, the father, and Mrs. Mary Helen Willard, the mother of the plaintiffs, one of whom is yet a minor. She represents in this suit as natural tutrix. Upon the death of the father, Mrs. Willard qualified as natural tutrix of the minors, and administered the succession in that capacity. The estate was largely in debt. The tutrix, it seems, called a family meeting to advise in regard to the interests of the minors. The meeting came to the conclusion that it was necessary to sell the property to provide for the payment of the debts, and prescribed the terms of sale. A sale was effected, but the purchaser refusing to comply with the terms of the sale, difficulties arose and some delay took place in having the title reinvested in the succession. The creditors became clamorous, and one of them having a mortgage upon the property to secure a debt of about twelve or thirteen thousand dollars, demanded a sale of property for the payment of his claim, and proceeded to apply for the administration of the estate. This was opposed by the widow, who claimed the right of administration, which was awarded to her, and, as administratrix, applied for and obtained an order of sale of the property of the estate to pay its debts. It was accordingly sold. The defendant purchased it at its appraised value, and a title was made accordingly. We are at a loss to see any foundation for the plaintiffs' claims. Their rights were residuary. The property was bound for the debts, the sale of it for the payment of those debts was inevitable. The sale of it was regular in every respect; all the formalities prescribed by articles 990 and 991 of the Code of Practice were complied with, and there is no ground to complain that the legal formalities necessary to divest the title of minors to property has been disregarded. It is therefore ordered that the judgment of the District Court be affirmed with costs.

Rehearing refused.

NO. 2798.—CHARLES GALLAGHER v. PIKE, LAPEYRE & BROTHER.

A party, or parties, who have contracted to sell and have sold any public security, such as a bond, may be compelled by suit to deliver the bond sold, or to pay the value thereof at the time of the sale, the vendor being first put in default.

**A**PPEAL from the Seventh District Court, parish of Orleans. *Collens, J. Gibson & Austin*, for plaintiff and appellee. *Hays & New*, for defendant and appellant.

WYLY, J. The plaintiff sues the defendants for the delivery of six and one-fourth levee bonds for \$1000 each, with interest coupons attached to the same, since July 1, 1868, or in default thereof for \$1977 22.

He alleges that in August, 1868, he purchased from them said bonds, amounting in the aggregate to \$6250, with interest bearing coupons at eight per cent., at fifty-six cents on the dollar, deliverable in ninety days, which time, by agreement was subsequently extended, that the said Pike, Lapeyre & Brother refused to deliver said bonds, notwithstanding the petitioner made a legal tender of the price on the tenth of February, 1869.

He further alleges that the value of said bonds at the time of judicial demand was eighty-six cents on the dollar.

He therefore prays for the execution of the contract, or for the difference between the value of the bonds in August, 1868, and June, 1869, which he alleges to be \$1977 22, for which he prays judgment in *solido* against them.

The defendants plead the general issue. They aver that they sold to plaintiff the margin on six and one-fourth levee bonds, \$1000 each, at fifty-six cents on the dollar, for the period of ninety days, to begin fifth of August, 1868; that if at the end of said ninety days, the bonds in question were selling for more than fifty-six cents on the dollar, the respondents should pay plaintiff the excess; if for less, plaintiff should pay the respondents the deficiency.

They aver that at the end of ninety days said bonds were selling below fifty-six cents on the dollar, and that the deficiency amounted to \$360, for which they pray judgment in reconvention. They specially denied that there was ever any contract to deliver the bonds; and they aver that said marginal sale was not to extend beyond ninety days.

The court gave judgment for the plaintiff as prayed for, and the defendants appeal.

F. H. Hatch, who made the transaction with Pike, Lapeyre & Brother, and who is a disinterested party, says: "On or about the fifth of August, 1868, acting as the agent of Smith & Co., and authorized by Pike, Lapeyre & Brother, I sold to Charles Gallagher twelve thousand five hundred dollars of eight per cent. levee bonds, at fifty-

six cents on the dollar, deliverable in ninety days, with eight per cent. interest; \$6250 being for the account of Pike, Lapeyre & Brother, and like amount for Sam. Smith & Co. There was no margin—this was a contract to deliver the bonds, and there was no margin whatever. I held the power of attorney for Sam. Smith & Co. There was a settlement made, I think, about the tenth of February, by Sam. Smith & Co. with Gallagher. When Mr. Smith returned from the North, early in November, 1868, I turned the matter over to him. Mr. Smith assumed entire charge of this matter. I heard Mr. Smith say that he had agreed with Pike, Lapeyre & Brother to extend this time."

Sam. Smith was examined as a witness. He testified that: "I returned from the North in the month of October, 1868. On my return home Mr. Hatch informed me of this sale of bonds for account of our firm and Pike, Lapeyre & Brother, as being sold on ninety days contract at the price of fifty-six cents on the dollar. A few days previous to the expiration of the ninety days, Mr. Gallagher called on me and said that he would like to extend the time for the settlement a few days. I said we had no objection. I called on Pike, Lapeyre & Brother and stated what Mr. Gallagher said. They said they had no objection—to do for them as we would do for ourselves in the matter. I notified Mr. Gallagher of this. I think it was about the tenth of February that Mr. Gallagher called on them for the delivery of the bonds. It was about the time we settled with him. The bonds were worth on the tenth of February, the time of our settlement, about eighty-four cents. I estimated them at that. I never heard anything of the margin until after this suit was brought. It was a sale such as we had bought before for a joint account with Pike, Lapeyre & Brother and other parties. It was Mr. Lapeyre that I saw in regard to this extension. I notified Pike, Lapeyre & Brother of our settlement with Gallagher, about the tenth of February. I told them what kind of a settlement I had made with Gallagher. I submitted the proposition of Mr. Gallagher to Mr. Pike, and he said that he could not settle the matter until Mr. Lapeyre returned."

Charles Gallagher testified that in August, 1868: "I bought from F. H. Hatch one-fourth of fifty levee bonds with eight per cent. interest coupons thereon, at fifty six-cents on the dollar; the bonds were for \$1000 each. I did not know Pike, Lapeyre & Brother in the transaction until Mr. Hatch disclosed them to me. These bonds were purchased by me absolutely to be delivered in ninety days from purchase. When Sam. Smith came home from the North, I went to him a little before the maturity of this contract, \* \* \* and I told him to give me my bonds and I would close the matter up, or if he thought the bonds would improve, I would like to extend the time. He told me he had no objections to extending the time, and did not think Mr. Pike

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would have; that he would go and see Mr. Pike. The next day I called with sufficient funds to pay for the bonds, and he informed me that he had seen Mr. Pike, and that Pike was perfectly willing that the time should run on. I was always ready and willing to take these bonds.

\* \* \* About the tenth of February, 1869, I made a tender of ———; this was the fifty-six cents with interest on the fifty-six cents per dollar, but in the meantime they had collected the coupons, which more than reimbursed them for the interest. \* \* \*

\* \* \* I sent the money for the bonds to Pike, Lapeyre & Brother by J. E. Austin. They refused, and I deposited the money with Smith & Co., and notified Pike that it was subject to his order. \* \* \* It is the only contract I made. It was for the absolute delivery of the bonds. There was no marginal sale about it."

On the other hand, the defendants rely in support of their defense, that it was a marginal sale, on the evidence of Lapeyre and Brother, two of the members of the firm of Pike, Lapeyre & Brother. The testimony of these two witnesses is not sufficient to overcome the evidence of the plaintiff, who testified, and of the disinterested witnesses, Hatch and Sam. Smith, whose testimony fully corroborates his statements.

We are satisfied that the contract of the fifth of August, 1868, was a real sale.

We are also satisfied that before the expiration of the time for the delivery of the bonds there was an extension agreed to by the parties.

Smith, a disinterested witness, swears positively to it. He says: "I called on Pike, Lapeyre & Brother, and stated what Mr. Gallagher said. *They said they had no objection—to do for them as we would do for ourselves in the matter.*"

Smith gave the extension and stated to Gallagher that Pike, Lapeyre & Brother had agreed to it. Subsequently Smith & Co. settled with Gallagher for their part of the bonds.

Our conclusion is that on the tenth of February, 1869, the defendants were put in default for the execution of the contract; and they had no just cause to refuse to execute it.

We think the court erred in estimating the value of the bonds at the time of judicial demand in June, 1869. The damages resulting from the breach of the contract must be estimated at the day the defendants were in default for the execution thereof, which was the tenth of February, 1869. The value of the bonds at that time is shown to be eighty-four cents on the dollar.

It is therefore ordered that the judgment appealed from be set aside, and it is now ordered that the defendants deliver to the plaintiff six and one-fourth levee bonds for \$1000 each, with eight per cent. interest coupons attached thereto, since first July, 1868, as prayed for, within



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ten days from the date of this judgment, on the plaintiff paying to them \$3500, the price thereof; and in default of delivery of said bonds within the ten days, it is ordered that the plaintiff recover judgment against the defendants in solido, for seventeen hundred and fifty dollars, with five per cent. interest from judicial demand, said amount being the difference between the value of said bonds on the day of the making of the contract and the day of the breach thereof by the defendants, February 10, 1869.

It is further ordered that the defendants pay costs of the court below and the plaintiff pay costs of the appeal.

Rehearing refused.

No. 2635.—LA SOCIETE DE BIENFAISANCE DES ARTS ET METIERS v. WILLIAM B. MORRIS & Co., Agents of the Home Mutual Insurance Company of New Haven, Connecticut.

A defective citation addressed to a company, or the agents of a company, is cured by the defendants appearing and answering by general denial.

An insurer does not lose his right to recover on the policy in case of loss by fire, because he has not paid the premium, if it be shown that it was not the custom of the company to exact prompt payment. 19 An. 214.

**A** PPEAL from the Fifth District Court of New Orleans. *Leaumont, J. James Ligan*, for plaintiff and appellee. *G. Campbell*, for defendants and appellants.

TALIAFERRO, J. This is an action to recover from the defendants \$4500 on a policy of insurance taken by the plaintiffs on certain property of theirs subsequently destroyed by fire. The answer is a general denial. The plaintiffs had judgment, and defendants have appealed. The defense is mainly technical. It is contended that no legal citation was ever issued to or served upon the insurance company. The suit is brought against Morris & Co., agents, and the Home Mutual Insurance Company, of New Haven, Connecticut. The style of the suit appears upon the citation, and it is addressed to William B. Morris & Co., agents. If this were defective, we think the defect cured by the answer. Morris & Co., individually and as agents of the company, were distinctly made defendants. The defendants, as they style themselves, appeared by their attorney and answered by general denial.

It is contended on the part of the defense that the plaintiffs had not complied with the requirements necessary to enable them to recover, viz.: notices of loss and preliminary proof. The evidence we think shows a state of facts that obviates that necessity. It is shown that on the morning after the occurrence of the fire by which the plaintiffs' buildings were destroyed, the accident was made known to the secretary and the agent of the company, Morris, and that the latter

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promptly ignored all responsibility of the company, saying that the policy had within a few days been annulled on account of the non-payment of the premium. At the time the contract was entered into the agent was requested to send the memorandum bill to the treasurer of the society, who would pay it, to which the agent replied, "that is all right." Payment of the premium was not exacted at the time of making out the policy. That instrument was made out, as the agent states, about the seventh of February, 1868, and was put into the safe subject to call." The clerk of the company was instructed to collect the premium, and he testifies that he went several times to the hall of plaintiffs for that purpose, but failed to find any person there representing them.

We do not think, under the state of the facts shown, that the plaintiffs lost their rights under the contract. See the case of *Pino v. Merchants' Mutual Insurance Company*, 19 An. 214; *Parsons on Contracts*, vol. 2, page 461.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

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ON APPLICATION FOR REHEARING.

HOWE, J. We understand the judgment in this case to be one against the Home Insurance Company, represented herein by its agents, W. B. Morris & Co. There is no judgment against W. B. Morris & Co., individually.

The point in regard to apportionment was not made in the original argument, and will not now be examined.

Rehearing refused.

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No. 3630.—G. LAROQUE TURGEAU v. JULES BRADY.

The appointment of a receiver for a corporation on an *ex parte* application, without even alleging its insolvency, is absolutely null, and carries with it no right to receive the assets or revenues of the company.

**A**PPEAL from Seventh District Court, parish of Orleans. *Collens, J. Kounte & Elliot*, for plaintiff and appellant. *J. R. Curell*, for defendant and appellee.

WYLY, J. The plaintiff, as receiver of the Louisiana Petroleum and Coal Oil Company, sues the defendant for \$3750 the balance remaining in his hands as President of the Louisiana Petroleum and Coal Oil Company.

The defendant excepted to the capacity of the plaintiff to bring the suit, alleging that the order appointing him receiver is null and void, and also that the Charter of the Louisiana Petroleum and Coal Oil

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Company has never been declared forfeited, nor has any proceeding for that purpose been prosecuted contradictorily with said company.

The court maintained the exception, and dismissed the case as of nonsuit. The plaintiff appeals.

It appears that the plaintiff was appointed receiver on an *ex parte* application, and without any notice whatever to the Louisiana Petroleum and Coal Oil Company. The insolvency of the company was not alleged; on the contrary, in his brief the plaintiff affirms its solvency.

This appointment was an absolute nullity; and it is entirely immaterial whether or not the court dismissed the rule to have it so declared.

The court making the appointment was utterly without authority to do so on the *ex parte* application, in view of the fact that the corporation was solvent, and no proceeding instituted for the forfeiture of its character. The plaintiff has no right to the funds which he seeks to recover from the president of a solvent corporation. 16 An. 237; Ray's Digest, sections 688, 731; 5 An. 740; 12 An. 285; Hennen's Digest, 330, section 8.

Judgment affirmed. Rehearing refused.

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No. 2558.—ALEXANDER WALKER v. JOHN BIETRY.

An attorney at law who makes a contract with his client for a stipulated amount as his fee for attending to a litigation, can not afterward recover on a *quantum meruit* for services rendered in the same litigation.

**A** PPEAL from the Seventh District Court of New Orleans. *Collens, J. D. O. Labatt and James Lingan* for plaintiff and appellee. *Cotton & Levy* for defendant and appellant.

TALIAFERRO, J. The plaintiff, who is an attorney at law, sues on a *quantum meruit* for professional services rendered the defendant in effecting an adjustment and compromise, much to the benefit of the latter, of a litigation that had existed between the defendant and the city authorities of New Orleans, in regard to a certain contract for public work entered into by the parties.

The defendant in his answer denies absolutely that he entered into any such engagement with the plaintiff as alleged by him. The judgment of the court below awarded the plaintiff the sum of \$674 60. The question presented in this controversy is mainly as to the fact whether the plaintiff was engaged by the defendant, as alleged by the former, and whether the plaintiff has established the value of his services.

The testimony taken in the case makes up a large record of conflicting and contradictory statements by the witnesses. The defendant and several other persons, it seems, had entered into contracts with

the city authorities in regard to working upon the public streets in certain specified parts of the city. These contracts were annulled by General Sheridan, who at the time was in command of the military district within which the State was then arranged. The plaintiff, it seems, was employed by several of these parties, the defendant among them, to obtain redress through the courts, and accordingly he proceeded by mandamus against the mayor, to compel a compliance of the city with her contract with one O'Hara, making that a test case, all the others standing on the same ground. There does not appear to be any disagreement between the plaintiff and the defendant in reference to the compensation the plaintiff was to receive for his services in the mandamus case. It appears that he required a retainer of \$300 and a contingent fee besides for all the cases. His *pro rata* amount of the retainer the defendant paid. The attorney was successful in the District Court, but upon appeal to this court the judgment of the District Court was reversed. A rehearing was applied for, pending which the vacation of the court came on, the matter then standing as at first, with the contracts of the parties annulled. The plaintiff says in his testimony that at the solicitation of the parties who had left their contracts with him he entered into negotiation with the mayor and the members of the city council, and especially with the members of the Committee on Streets and Landings, for the purpose of effecting a compromise and a reinstating of the different parties in their several contracts. This the plaintiff represents as a new engagement, and not at all a part of the original undertaking in the courts in which he proceeded by mandamus; that when he entered into this second engagement he notified O'Hara, whom he represents as the acting party in the affair, that it would be necessary to come to a definite understanding in regard to his contingent fee; that he drew up an agreement by which they were to bind themselves to pay a certain percentage on the contracts in case they were maintained. This instrument was not signed, it seems, and was not afterward seen. That nothing definite being agreed upon, he informed O'Hara that he would claim a *quantum meruit*, and proceeded with the business. The defendant, as already stated, ignores these statements of the plaintiff, and we think it is not satisfactorily established that he did agree to pay anything under the new and subsequent agreement alleged by the plaintiff to have been made. From the position the parties stand in, as shown by the evidence, we think that the services rendered by the plaintiff throughout must be regarded as having been rendered in pursuance of the original contract, and as the plaintiff was successful in getting the contracts of the several parties reinstated, the defendant is bound to pay him his portion of the common debt. The three hundred dollars contingent upon a successful effort in behalf of the parties they are

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bound to pay. The defendant's part or quota, it seems, is one-third. The judgment of the lower court predicated upon a small per centage of the amount claimed we think erroneous.

It is therefore ordered that the judgment of the lower court be annulled. It is further ordered and adjudged that the plaintiff recover from the defendant one hundred dollars, defendant and appellant paying costs in the lower court; the plaintiff and appellee the costs of this appeal.

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NO. 3627.—STATE OF LOUISIANA *ex rel.* MISSISSIPPI VALLEY NAVIGATION COMPANY *v.* H. C. WARMOTH, Governor of the State.

The Governor of the State as chief executive officer, cannot be compelled by mandamus to perform acts required by law to be done by him.

In 22 An. page 1, it was decided that the judiciary was without power to direct the Chief Executive of the State to perform any act coming within the range of his duties as Governor. That decision is reaffirmed by the decision in this case.

**A**PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. John H. New*, for plaintiff and appellee. *Semmes & Mott*, for defendant and appellant.

TALIAFERRO, J. The relators applied to the Sixth District Court of New Orleans for a mandamus to compel the Governor of the State to subscribe, in the name of the State to the capital stock of the Mississippi Valley Navigation Company of the South and West, one thousand shares of one hundred dollars each, in pursuance of an act of the Legislature, taking effect in March, A. D. 1870. A rule *nisi* was granted, and the Governor answered that he had decided not to exercise the authority vested in him by the act incorporating the company appearing herein as relators, for the reason that he believes and entertains the opinion that the best interests of the State would be subserved by withholding the subscription authorized by that act. He further answered that the constitutional limitation of the power of the State to contract debts having been adopted in December, 1870, and the limit of twenty-five millions of debt having been reached, the authority vested in the respondent was revoked by the adoption of the constitutional amendment limiting the State debt.

It is contended on the part of the respondent, that the act vests a mere authority in the Governor to subscribe for the stock, and as that authority was not exercised prior to the adoption of the constitutional amendment limiting the State debt, he cannot now exercise it if he deemed it proper. The rule was made absolute by the court *a qua*, and the respondent has appealed. On the part of the relators it is argued that where a public officer or body is clothed with power to do an act which concerns the public interest, or the rights of third persons, the execution of the power may be insisted upon as a duty,

although the statute creating it be only permissive in its terms. On the other hand it is held, that this doctrine is inapplicable in the present case, because no private right of the relator is involved, and no public rights are concerned—that this act is a mere authority given by the State to one of its own officers to make a contract with a private corporation. The interest of that corporation may be promoted by making the contract with the State, but it has no legal right to compel the State to make the contract.

It is not necessary to determine whether terms merely permissive, used in a statute, are in all cases to be held to be mandatory. Neither do we feel it incumbent upon us to go into the consideration of the character of the act required to be performed by the respondent as being merely ministerial, or otherwise, or to investigate the reasons assigned by him for declining to act.

We had occasion in the case of the State on the relation of Oliver and others vs. the Governor of the State, 22 An. page 1, to go at some length into the inquiry as to the power of the judiciary to compel by mandamus the chief executive officer of a State to perform acts required by law to be done by him. We then concluded that such a power is not vested in the judiciary, and we see no good reasons for receding from the views then taken of this subject. 4 Wallace 500 and 501.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed. It is further ordered that the rule be discharged at the relator's costs.

Rehearing refused.

#### No. 3772.—SUCCESSION OF NELSON DURAND—On Oppositions to Tableau of Debts.

A judgment obtained on the allegation that the defendant has permanently left the State is void, if it appear that at the time the attachment was sued out the defendant resided in the State. If the property attached has been alienated before the seizure, and the defendant makes no appearance in the attachment suit, nor has been personally cited, then and in that case the judgment is alike void.

A valid judgment obtained by attachment only operates on the property attached, and forms no personal claim against the defendant or his estate, and such a judgment so obtained should not, therefore, be classed on the tableau filed by the executor as a debt against his succession.

The action to set aside a mortgage on the ground of fraud is prescribed by one year.

The burden of showing that a mortgage is simulated falls upon the parties who allege it.

**A** PPEAL from the Parish Court, parish of Avoyelles. *Edwards*, Parish Judge. *Julien A. Seghers* and *Waddill & Barbin*, for appellees. *Irion & Thorpe*, for opponents and appellants.

**HÓWE, J.** This case presents the merits of a number of oppositions filed by persons claiming to be creditors, to the tableau of debts pre-

## Succession of Durand.

sented by the administratrix, Mrs. Eliza Bowman, widow of Nelson Durand. We will examine them seriatim.

*First*—The claim of the widow for the homestead was properly rejected, and is not urged in this court.

*Second*—The judgment of Segastille Armand seems to have been rejected through error. It was rendered in 1866, and duly recorded. The deceased never contested its validity, and the parties opposing it now have neither furnished any evidence that it is fraudulent, nor any agreement to that end, before this court.

*Third*—The judgments of Mrs. Marius Gauthier and of Mrs. Jean B. Isabelle should have been stricken from the tableau. They were obtained by attachment in the Sixth District Court of New Orleans, in the year 1865, on the allegation that Nelson Durand, the defendant, had permanently left the State. He was at that time, and for some years had been, and was until his death domiciled in and a resident of the parish of Avoyelles. The property attached had been alienated by him by a sale made and duly recorded in 1847, and forms no part of the inventory of the succession. Moreover, he never made appearance, nor was he personally cited. And even if the attachments were valid, and the property seized the property of defendant therein, the judgments would extend only to the property seized, and would neither be personal claims against Nelson Durand nor judicial mortgages against the succession property inventoried herein. 2 An. 563; 4 An. 585; 6 An. 550; 9 An. 524.

*Fourth*—The claim of Mrs. Durand as holder of the notes made by Nelson Durand in favor of Johanna Spiegelhalter, the mother of Mrs. Durand, and secured by special mortgage July 20, 1863, and recorded July 25, 1863, was opposed as fraudulent and simulated, and on the ground that the provisions of the laws of the United States in reference to stamp duties had not been complied with.

The allegation that the mortgage was fraudulent, if it means that the mortgage had a real existence, but was intended to give an illegal preference, is met by the plea of prescription of one year, which should prevail.

The allegation of simulation, which could only be made on the theory that the mortgage had no real existence, is not established. The mortgage was made and recorded as above stated, in July, 1863. It is shown that Mrs. Spiegelhalter had money and property, and was in the habit of making advances to Nelson Durand in his mercantile business. It was natural that she should thus assist her daughter's husband, and that he should protect her by a mortgage. The burden of proving simulation was on the opponents, and we do not think they have proved it.

There is no force in the point made in regard to stamp duties. The

notes and mortgage, and the certificate of the actual registry of the mortgage in Avoyelles, in July, 1863, were either not denied, or were received in evidence without objection. The registry was long prior to any of the opponents' judgments. No stamps had been affixed at the time the mortgage was passed, for none were probably to be had in Avoyelles at that date. But in August, 1871, under the provisions of the act of Congress of July 14, 1870, the necessary stamps were placed on the notes by the Collector of Internal Revenue of the Second District of Louisiana, at the request of the holder. The claims of the United States were fully satisfied, and we do not think the opponents have any legal reason to complain of the regularity of the registry of the mortgage, or can say that it does not outrank their subsequent judgments.

Our attention is called to the fact that by the act of Congress of 1866, of which this act of 1870 was an amendment, it is provided that the recording of an instrument under the permission therein allowed to be given is not to affect any right acquired in good faith *prior to such recording*. We do not perceive that this proviso affects this particular case in any manner, for this is not a case where any recording or registry was made after the stamps had been affixed by the Collector of Internal Revenue.

We conclude, then, that the Judge below did not err in refusing to strike these judgments from the tableau.

*Fifth*—We think the judge erred in allowing the claim of L. V. Gremillion, public administrator, for fees or commissions.

The widow was confirmed as natural tutrix, and as such was administering the estate, having had an inventory made. A creditor took proceedings by injunction and to cause himself to be appointed administrator. This matter was afterwards settled by the widow being appointed administratrix, and giving bond. During all this time the estate was being administered by the widow, and we do not think that there was such a "contestation for the administration of the estate" as justified the appointment of the public administrator to "administer it" and entail further expense upon it, during these proceedings, under the second section of the act No. 87, of 1870, p. 120. That section, we presume, refers to a case where, pending a contest by claimants for the administration, there is no one in charge of the property. Any other construction would open a wide field for collusion and spoliation.

It is therefore ordered that the judgment, so far as it rejects the widow's claim for homestead and dismisses the opposition to the mortgage notes and mortgage in favor of J. Spiegelhalter, be affirmed; and that in other respects it be reversed; that the judgments in favor of Mrs. Marius Gauthier and Mrs. Jean B. Isabelle be stricken from



the tableau; that the claim of L. V. Gremillion be also stricken therefrom; that in other respects, as modified by that portion of the decree of the lower court which is herein affirmed by this decree, the said tableau be homologated and approved, and the debts therein recognized, paid according to the rank therein assigned, and in due course of administration; and that the opponents who have appealed pay costs of appeal.

Rehearing refused.

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**No. 3771.—GUSTAVE S. ROUSSEAU et als. v. SHADIE ANN GAYARRE and Husband.**

The sheriff who serves any process or citation on a defendant is required to make a return on the original paper of the manner of such service. If he has made an error in making his return, and detects it before he files the paper in court, it is his duty to correct the mistake and make a return in conformity with the facts.

A service of citation at the domicile of the defendant is good if it be served upon a free person above the age of fourteen years, who resides at the domicile; and if the defendant resides on a plantation, then by the word domicile is meant any house or place of residence situated on the plantation which is occupied as a residence, so that the service is good if made on a person of proper age who resides in another house than that of the defendant; nor need such person be actually inside of the house of the defendant at the time of the service; it is sufficient if he or she resides at the domicile.

**A** PPEAL from the Fifth Judicial District Court, parish of Iberville. *Posey, J. Barrow & Pope*, for plaintiff and appellee. *A. & E. B. Talbot*, for defendant and appellant.

**WYLY, J.** On the twenty-ninth March, 1866, the plaintiffs bought from Pierre C. Riccard and his mother the tract of land described in the petition, it being then incumbered with a judicial mortgage in favor of the defendant, Mrs. Gayarre.

They now seek to remove that mortgage on the ground that the judgment from which it resulted was illegal, because:

*First*—That said defendants, P. C. Riccard and mother, Genevieve Belly, were never legally cited or served with copies of the petition in said suit, there being but one petition and citation pretended to be served by the sheriff.

*Second*—That said copy of citation and petition was not served at the domicile of said defendant, or on a person living in the house.

*Third*—Nor were copies of the citation and petition left at the usual place of domicile or residence of defendants in said suit, they being absent, by delivering them to a person apparently above the age of fourteen years, living in the house.

*Fourth*—That the sheriff's returns are not made according to law, in not showing where the domicile or house inhabited by said defendant is situated. That G. C. Grabert, on whom service was pretended to be made by the sheriff of citation and petition, did not reside at the

domicile of said defendants—so stated on his return—and was not living in the house of said defendant, but lived elsewhere; and said citation and petition were delivered to said Grabert by said sheriff, on the public road, and said return is false in these two particulars as well as in the statement that said defendants were absent from their domicile at the time; and said parties were never legally cited.

They further allege that between the latter part of February and the ninth of April, 1870, said sheriff's return was fraudulently and illegally altered by some one unknown to petitioners, in material and substantial words. Said return in the original was in the singular number, as follows:

- “Served a true copy of the within citation, together with certified copy of petition annexed, on J. C. Grabert. \* \* \* Whereas it has been altered to read in the plural number, the article ‘a’ being erased or scratched; and the word ‘copy’ altered to read ‘copies’ in both instances.”

The defendant, Mrs. Gayarre, denied generally the allegations of the petition, and specially the allegation that the sheriff's return in her case against Riccard and mother had been fraudulently altered as alleged. Riccard and his mother, who were also made parties by the plaintiffs, answered by general denial. They admitted, however, that Mrs. Gayarre had judgment against them as set forth in the plaintiff's petition; that “said judgment was for a debt justly due, and that these defendants were served with the citations in the case, and admit the legality and binding effect of said judgment against them.” The court gave judgment first for the defendant, Mrs. Gayarre, but granted a new trial and finally gave judgment for the plaintiffs, annulling the judgment complained of, and ordering the mortgage resulting therefrom to be canceled. The defendant, Mrs. Gayarre, has appealed. The attempt to show that the sheriff's return was improperly altered, as alleged, is a failure. The interlineation was made, according to the positive declarations of the sheriff, who testified as a witness, before his return was filed, on the suggestion of the counsel for Mrs. Gayarre; and he swears that it conforms to the truth. The words interlineated are proved to be in the handwriting of the sheriff by several witnesses. The attempt to discredit or impeach the veracity of the sheriff was also an utter failure.

The clerk's cost bill showed that two copies of the petition and citation were made out in the case.

We know of no law forbidding the sheriff from correcting his return, when he discovers the error before it is filed in the case. It was his sworn duty to make his return conform to the truth; and he would have been derelict to it if he had filed an incorrect return after the error had been called to his notice by the counsel for Mrs. Gayarre.

J. C. Garbet, to whom the copies of the citation and petition were delivered, was the overseer of Riccard and his mother, and lived on the plantation in a house very near the residence of his employers, who were absent at the time the sheriff called to serve the citation. Woods, the sheriff, testifies that Dr. Lambremont was with him at the time he made the service at domicile; that "witness went into the house and found no one at home; was going back on the plantation to find the overseer, when Dr. Lambremont pointed him out to witness coming up the plantation road told witness the overseer's name, and witness went up and made the service after he had got out of the gate on the public road."

Now, whether the papers were delivered to Garbet at the gate on the public road, or in the dwelling occupied by his employers, under the facts of this case, is of no consequence. The sheriff had gone into the house to make the service, but finding "no one at home," was about going out on the plantation to make the service upon the overseer, when the latter came up the "plantation road" in front of the house, and there the service was made.

It would have been a mere idle ceremony to have required the overseer to enter the house in order to deliver to him the papers which were designed for his employers. If he had been requested to do so, and had refused, the sheriff would not have been able to make the service, under the theory of the plaintiffs, notwithstanding the overseer was then immediately in front of the dwelling. This would be sacrificing the obvious meaning of the law, solely to adhere to its letter. Nor is it of any consequence that it has been proved that the overseer did not actually dwell in the same house with his employers, but in another on the premises near by, about one acre distant. The plantation was the domicile of the defendants; and the overseer living in a cabin near the dwelling of his employers, was, in contemplation of law, living at their domicile. Under the theory of the plaintiffs it would have been impossible to make a service at domicile on Riccard and his mother, because, per chance, no one else actually lived under the same roof, although the surrounding cabins on the premises might be filled with persons upon whom service could be made. Such a construction would defeat the purpose of the law and put it in the power of a designing debtor to deprive his creditors of one of the lawful modes of summoning him into court. That construction must be avoided which defeats the obvious meaning of the law and paralyzes its salutary operation.

In the case of the succession of Williams (10 An. 224), this court said: "The regularity of this judgment, or tacit issue, is contested on the ground of the insufficiency of the service of the citation and petition, which was made during Williams' absence, on his overseer,

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at his plantation. It was objected that it does not appear to have been made at the house of Williams in the manner prescribed by articles 189 and 201 of the Code of Practice. According to the interpretation of those articles in the case of *Maxwell vs. Collier*, 6 R. 86, we must consider the service as sufficient." See also *Bird vs. Cain*, 6 An. 248.

The sheriff's return conforms to the truth, and is sufficient in its recitals for a valid service at domicile. The parties for whom the citations were delivered to the overseer, Riccard and his mother, are made parties to this suit by the plaintiffs, and in their answer they admit that they "were served with the citations."

Let the judgment appealed from be annulled, and let plaintiffs' demand be rejected with costs of both courts.

Rehearing refused.

#### NO. 1797.—CHARLES GAYARRE v. GUSTAVE SABATIER.

If an indorser on a bill of exchange, or a promissory note, be discharged from liability because the holder has failed to give the proper notice, then the indorser can not thereafter be held liable, unless it be shown that he has, subsequently to his discharge, assumed the payment.

**A**PPEAL from the Third District Court of New Orleans. *Emerson, J. Elmore & King*, for plaintiff and appellee. *Alfred Grima*, for defendant and appellant.

**WYLY, J.** The defendant appeals from the judgment against him as indorser of two drafts and one promissory note.

There are several defenses, but we deem it only necessary to inquire whether the conditional obligations of the defendant have been rendered properly unconditional by due notice of dishonor, or whether he has admitted the rights of the holder by an unconditional promise to pay since the maturity of these obligations.

From the view we have taken of the case, it will not be necessary to examine the defendant's exceptions to the evidence, because, with all the testimony in the record, the case appears to be clearly with him. The obligations in suit were payable in the city of New Orleans, where the acceptors and makers, as well as the defendant, the indorser, resided, and they matured in 1863; at that time the plaintiff and his transferrer resided in the parish of St. Helena. The domicile of the obligors being in Union lines at the maturity of the instruments, and the domicile of the owner and holder being in rebel lines, all intercourse between them was prohibited. If the defendant had promised the party with whom the plaintiff left copies of these instruments to pay them, which is not satisfactorily shown, it would not be obligatory, because the parties were incapable of making at the time a conventional obligation; and the party pretending to act for the

Gayarre v. Sabatier.

plaintiff or his wife, could not be their agent by reason of the same prohibition, he residing in Federal lines, and his principal in rebel lines.

Of course the plaintiff could not make legal demand of the acceptors and the makers during the time intercourse was prohibited; but it was his duty to do so promptly after this obstruction terminated. It appears that he and his wife, from whom he acquired these drafts and note, returned to this city on the second day of June, 1865; but demand was not promptly made of the acceptors and the makers, and due notice of dishonor was not given to the defendant. The plaintiff and the defendant both testified, and their evidence conflicts. After carefully examining all the evidence in the record, we are satisfied that there was not proper diligence; that the defendant was not promptly notified of the dishonor, and that he has not since maturity unconditionally promised to pay the drafts and note upon which he is sued.

It is therefore ordered that the judgment herein be annulled, and that there be judgment for the defendant, with all costs.

Rehearing refused.

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No. 3702.—FRITZ HUPPENBAUER v. LOUIS DURLIN et al.

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A judgment creditor who acquires a preference on the property of his debtor by seizure is not entitled to proceed to the sale after the debtor has obtained a respite by the consent of a majority of his creditors.

Only creditors who have a privilege on the property of the debtor before, and at the time the respite is granted, can proceed to sell under article 3095 of the Revised Civil Code after the respite is granted. A creditor, therefore, who has a privilege or preference on the property of his debtor, resulting from a seizure alone, is not permitted to proceed to the sale in violation of the respite.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Rogers & Blanc*, for appellant. *O. Roselius & Alfred Phillips*, for appellees.

**WYLY, J.** The plaintiff enjoins the defendants from executing a judgment against him, on the ground that he has obtained from his creditors, by judgment of court, a respite of one, two and three years; that the defendant, Louis Durlin, was a party to said suit, having filed an opposition to the homologation of said proceeding; that notwithstanding the dismissal of his opposition and the granting of the respite, the said Louis Durlin is attempting to execute his judgment against the plaintiff, which has caused damage to him to the amount of \$1000. The prayer of the petition is for an injunction, for its perpetuation, and for \$1000 damages.

The defense of Durlin is: that the respite is not binding on him and can not prevent the execution of his judgment, because he is a

privileged creditor, having levied his writ prior to the granting of the respite.

The court perpetuated the injunction, and the defendant, Durlin, appeals.

The plaintiff insists that the plea of *res judicata* is applicable, because in Durlin's petition of opposition to the respite he alleged that he was a privileged creditor by reason of his prior seizure of the property of his debtor; and the opposition being rejected, the issue whether he is a privileged creditor or not was decided adversely to him, and that judgment is final.

It is true the defendant described himself in the petition of opposition as a privileged creditor, but that was an issue not involved in the contest. The question was, whether the proceedings were regular, and whether or not a majority of the creditors had consented to the respite. This was the issue determined when the opposition was dismissed and the judgment of respite granted.

The plea of *res judicata* is therefore unavailing.

The defendant contends that by virtue of his seizure he is a privileged creditor, under article 722 C. P., and the respite is not binding on him by reason of article 3095 of the Revised Code, which declares that "the following classes of persons can not be compelled to enter into any contract of respite or remission: privileged creditors, of what nature soever their privilege may be, and creditors who have a special mortgage by public act; minors, for the balance of account of their tutorship; wives, for their dotal rights and for the right of reclaiming their property. Therefore the privileged creditors and those who have a special mortgage as aforesaid can not be deprived by any respite, though agreed to by a majority of the creditors in number and in amount, of the right of seizing the property on which they have a privilege; but if such property do not prove sufficient to satisfy their debt they shall be restrained from acting for the surplus, either against the person of their debtor or against his effects, on which they have no privilege, except after the term granted by the respite. But creditors having a general mortgage are bound by the respite in the same manner as ordinary creditors." We think the privilege of preference acquired by the prior seizure, under article 722 C. P., is not embraced in the provision of article 3095 of the Revised Code, which exempts privileged and special mortgage creditors from the effect of the respite, so far as the property affected by the privilege or special mortgage is concerned.

Where it permits privileged creditors and those having a special mortgage to seize the property on which they have the privilege or mortgage, notwithstanding the respite, it means privileged creditors whose privilege arose from the nature of the debt. Revised Code,

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3186. It surely did not mean those who derived their privilege or preference alone from a prior seizure, under article 722 Code of Practice. For it would be absurd to provide that those who had already seized might again seize the same property, notwithstanding the respite. If the lawgiver had intended to preserve the right resulting from the seizure prior to the respite he would have said so, by declaring that the same might continue, and the sale of the property seized might be proceeded with, notwithstanding the respite. The right of the defendant resulted alone from the seizure.

Article 3095, Revised Code, permits privileged creditors to seize "property on which they have the privilege \* \*," notwithstanding the respite.

How could the defendant do this? How could he seize property on which he held a privilege? In order to make a new levy he must release his first seizure. To do this would destroy his preference.

The law before us, in a case like the one in view, gives the right to seize, provided there already exists a privilege. The existing privilege gives the right to seize. The defendant seized in virtue of no existing privilege; his right resulted alone from his seizure. Now the law giving privileged creditors the right to seize the property affected with their privilege, notwithstanding the respite, can not fairly be construed to give the same advantage to a creditor seizing in virtue of no privilege, but whose preference right resulted alone from the seizure.

And the article permitting the property affected with a privilege to be seized after the respite, is not a law validating a seizure made where there was no existing privilege, and authorizing the sale to be proceeded with, notwithstanding the respite.

Judgment affirmed.

Rehearing refused.

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No. 2632.—COMMERCIAL BANK v. W. C. HARRISON and others.

A surety on an appeal bond who denies his signature can not, after it has been proved, be heard to urge other defenses to his liability on the bond.

**A** PPEAL from Sixth District Court, parish of Orleans. *Cooley, J. Hornor & Benedict*, for plaintiff and appellant. *Bentinck Egan*, for defendant and appellee.

WYLY, J. The plaintiff appeals from the judgment discharging the rule sued out by it to make liable John S. Simonds, the surety on the appeal bond of the defendants.

The surety, Simonds, prays oyer of the bond, and denies his signature.

It appears that all the papers in the suit, including the appeal bond, have been lost or stolen from the clerk's office.

The plaintiff produced a witness who states that, in 1864 and 1865:

"I was deputy clerk in the United States District Court; as such I often saw John S. Simonds, the defendant, sign his name.

"And I have often sworn him as to the amount of his assets. I saw the appeal bonds that were filed in cases 18,012 to 18,018, inclusive, in this court. The blanks were all filled up in the handwriting of L. Madison Day. I knew it to be his handwriting from often seeing him write his name, and from the admission that it was his handwriting. I knew the signature of Hite to be his signature, as I have often seen him sign his name. I saw every one of these bonds were signed by L. Madison Day as witness, and every one of these bonds had the name of Simonds appended to them as surety. And from my knowledge of the signature of Simonds I verily believe them to have been signed by him, the present defendant, now in court. The bonds were the same in every respect, but were different as to the different plaintiffs' names inserted, according to the priority in which they were filed, but the signatures on each and every bond agreed.

"The name of W. C. Harrison was signed by L. Madison Day from my knowledge of his handwriting. George D. Hite's signature was signed by himself, as he has sworn to; and the signature of John S. Simonds as surety, to the best of my knowledge, from often having seen him sign his name in years past, and from having seen his signature since the inception of this suit, to documents filed in this case, I believe to be the signature of John S. Simonds, the present defendant."

The testimony of this witness substantially meets the requirements of article 325 C. P. There is other evidence in the record fully corroborating it, and showing beyond doubt that Simonds was the security on the missing bond.

Without proof strictly conforming to article 325 C. P., we would be inclined, in a case like this, to follow the rule stated in 16 L. 378, and 4 An. 55, and allow the fact to be shown by other competent evidence. We agree with the judge *a quo* that everything about this case looks highly suspicious, and we will add that this is the second time that the defendant, John S. Simonds, has appeared before this court urging the plea of oyer, after the papers were known to be lost or stolen from the clerk's office. See the case of the Boston Belting Company v. John S. Simonds.

Having denied unsuccessfully his signature to the bond, the defendant Simonds will not be heard urging other defenses. C. P. 326.

It is therefore ordered that the judgment appealed from be annulled, and it is ordered that the rule herein be made absolute at the costs of the defendant Simonds in both courts.

Rehearing refused.



## No. 2342.—T. T. TYREE &amp; CO. v. SANDS &amp; CO.—THOMAS P. MILLER &amp; CO., Interveners.

The comity of nations has well nigh the force of a rule of international law in private matters, (*jus gentium privatum*).

It is not the comity of courts but the comity of nations which authorizes the administration of foreign laws within the limits of another sovereignty; and, subject to certain familiar limitations, the courts have no discretion in the matter.

As a general rule, a *personal* contract, with its attendant privileges and effects, when made in another State, will be enforced in Louisiana upon *movables* according to the *lex loci contractus*, provided such enforcement be not contrary to our policy, and does not violate the order of priorities established by our laws, and does not injure the rights of our own citizens; and provided further, that we have by our own law, *lex fori*, the remedy which is asked.

The plaintiffs in April, 1869, having by the laws of Alabama a vendor's lien on cotton superior to that of the intervenors as pledgees, and it appearing that all parties were citizens of and made their contracts in Mobile; that an identical pledge was provided in New Orleans; and that a sufficient remedy existed by the law of Louisiana: Held—That the courts of Louisiana would enforce such vendor's lien upon the cotton sequestered in New Orleans.

There can be no imprudent confidence in trusting one's property to the guardianship of the law.

The plaintiffs having their lien, and the intervenors knowing the law and having it in their power to know the facts, the latter can not invoke against the former the rule that "as between two innocent parties the loss should fall on the one whose imprudent confidence has enabled the wrong-doer to get credit."

**A** PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Campbell, Spofford & Campbell*, for plaintiffs and appellees. *Randell Hunt and W. H. Hunt, and Dirrhammer & Kennard*, for intervenors and appellants.

Howe, J. On the thirtieth of March, 1869, the plaintiffs, Tyree & Co., sold to the defendants, Sands & Co., in the city of Mobile, one hundred and twelve bales of cotton. On the thirty-first of March the plaintiffs gave to brokers who had bought it orders on the warehouse for the cotton, and it was delivered. On the day of the sale the defendants, Sands & Co., made an arrangement with the intervenors, Thomas P. Miller & Co., to sell the latter a draft for \$25,000, to be drawn by Sands & Co., on Gardner, Bacon & Co., of New York, to which was to be attached as collateral a bill of lading for two hundred bales of cotton. The intervenors handed the defendants \$12,000 on account of this negotiation on the thirtieth, and the balance of the amount on the thirty-first of March, the defendants on the latter day delivering their draft, but not the bill of lading. The cotton, which included that sold by plaintiffs, was shipped on the first of April for New York via New Orleans, and bills of lading taken by Sands & Co., not to the order or in favor of intervenors, but in error to the order of Gardner, Bacon & Co. One of these bills was mailed to Gardner, Bacon & Co. by Sands & Co., in a letter of advice of April 1; a duplicate went forward on the vessel, and the triplicate was retained by Sands & Co. On the second of April Sands & Co. failed, and on that

day, after their suspension, delivered to the intervenors this triplicate bill of lading.

On the third of April, the plaintiffs not having been paid for the one hundred and twelve bales sold by them, although the sale was "for cash," sequestered the same in New Orleans, and Miller & Co. intervened, claiming the cotton in virtue of the bill of lading and the facts above set forth.

The court below decided in favor of the plaintiffs, and intervenors appealed.

Without dwelling on the infirmities of intervenors' title as pledgees in consequence of the error in the bill of lading, we prefer to pass at once on the principal point in the case.

By the laws of Alabama, in evidence, it is provided that "when a contract is made in the city of Mobile, by a factor for the sale of cotton, and by the general usage of the trade in that city, it is considered a sale for cash, but by such usage the purchaser, his broker or agent, is allowed a reasonable time to examine, reweigh and resample such cotton before paying for it; the seller shall have a lien, and a lien is hereby given him on such cotton for the purchase money, which lien is paramount to any sale or transfer of the cotton by such purchaser, and shall continue for *fifteen* days from the time when the cotton or an order for its delivery on any warehouseman with whom it was stored was delivered to the purchaser, his factor or agent, and no longer." Laws of 1858.

By the same statute the vendor could enforce this lien by a seizure.

By the law of Louisiana at the date of these transactions, a privilege identical in character and effect existed in favor of the vendor of cotton in New Orleans for *five* days, and this privilege could be here enforced by sequestration. Laws of 1855, No. 298. The seizure in this case was made before the lapse of *five* days from the sale.

By neither the law of Alabama nor of Louisiana in 1869, did this potent privilege require to be recorded in any way.

All the parties to this litigation are citizens of Mobile.

We see no reason, then, why upon well settled principles of public law, we should not enforce the lien of the plaintiffs. The existence of decent relations between civilized countries, and *a fortiori* between the States of this nation, depends in a considerable measure upon the enforcement by the courts of such liens as a matter of comity. And this comity we understand to be something more than a ceremonial politeness which may be exercised by our courts, or not, as the humor may seize them. It has, on the contrary, well nigh the force of a rule of international law in private matters, *jus gentium privatum*. 5 La. 299. "It is not the comity of courts but the comity of nations which authorizes the administration of foreign laws within the limits of

another sovereignty." 9 Porter (Ala.) 25. And, subject to certain familiar limitations, the courts have no discretion in the matter.

As a general rule a personal contract, with its attendant privileges and effects, when made in another State, will be enforced in this State upon movables, according to the *lex loci contractus*; provided such enforcement is not contrary to our policy, or does not violate the order of priorities established under our law; or does not injure the rights of our own citizens; and, provided further, that we have by the *lex fori* the remedy which is asked. Story on Conflict of Laws, 322 b.; et seq.; Kent Com., vol. 2, page 458, and authorities cited. Hanrick vs. Andrews, 9 Porter 25; Ohio Ins. Co. vs. Edmonston, 5 La. 299; Dobbin vs. Hewitt, 19 An. 513.

Thus Mr. Story mentions "the lien of a vendor upon real estate, \* \* the lien given for the purchase money upon goods or merchandise sold by the civil law, and by the law of some modern countries; the right of stoppage in transitu of the vendor of goods; \* \* the lien of a bottomry bond on the thing pledged; the lien of marines on the ship for their wages; the priority of payment *in rem* which the law sometimes attaches to peculiar debts or to particular persons."

"In these and like cases," he says, "where the lien or privilege is created by the *lex loci contractus*, it will generally, although not universally, be respected and enforced in all places where the property is found, or where the right can be beneficially enforced by the *lex fori*."

Now, the enforcement of the plaintiffs' lien was not contrary to our public policy, for at the moment it sprang into being an identical privilege was provided by the Louisiana statute. It did not violate any priority established by our laws, but, on the contrary, was in harmony with our rules of preference. It did not injure the rights of our own citizens, for no such rights were involved. And finally, it did not infringe the rule that the remedy must in all cases be in accordance with the law of the forum, for by the law of the forum the vendor of cotton could within five days enforce his lien by sequestration—the process adopted by the plaintiffs in this case.

Much stress was laid in the able arguments of the intervenors' counsel upon the equities of their case, and they have invoked the rule that as between two innocent parties, the loss should fall on the one "who by his imprudent confidence has enabled the wrong-doer to get credit with innocent parties." The case of Campbell vs. Penn, 7 An. 371, from which this rule is here quoted, is clearly not in point, having been decided in 1852, when the vendor of cotton had not the privilege which in 1869 existed for five days after sale and delivery, both in New Orleans and Mobile. In the case of Miltenberger vs. Hatch, 13 An. 528, decided in 1858, after this privilege had been established, no allusion was made to the equities in favor of intervenors,

but the vendor's lien was enforced. We incline to think that the "imprudent confidence" was reposed in this case rather by the intervenors than by the plaintiffs. But however this may be as matter of fact, we apprehend the rule cited has no application to plaintiffs. They had their lien. They had a right to rely upon it as upon any other legal protection. There can be no "imprudent confidence" in trusting one's property to the guardianship of the law. The intervenors, bankers of Mobile, knew the law, and were aware of the possibility of plaintiffs' lien. They might have easily asked if the cotton was paid for; they might have required their money to be used in paying for it. It is as likely as not that they knew it was not paid for, for they show by evidence and urge in argument that in Mobile the proceeds of drafts cashed as they cashed that of defendants, are usually applied to the *payment* of what the drawer owes for the cotton which he expects to pledge as collateral—"in this way aiding in the purchase of cotton."

Judgment affirmed.

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NO. 3466.—STATE ex rel. LIVINGSTON & GUTHRIE v. JAMES GRAHAM, Auditor.

REPORTER.—This case was first decided in favor of the defendant and appellant, and afterward, on rehearing, the first decree was set aside, and the cause was remanded, so that no principle of law was settled by the decision.

**A** PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. Billings & Hughes* and *J. B. Howard*, for relators and appellee. *Hornor & Benedict*, for defendant and appellant.

WYLY, J. The defendant appeals from the judgment rendering peremptory the mandamus sued out by the relators, requiring him forthwith to take up the warrants issued by the President of the Board of Public Works in favor of the relators, amounting to \$62,643, by issuing therefor his warrants as Auditor upon the general fund of the State for said amount.

The warrants held by the relators, and upon which they demand from the Auditor State warrants for like amount, were issued to them by the President of the Board of Public Works, under a contract made by them with the relators on the tenth December, 1870, for the purpose of removing obstructions and improving the navigation of Bayou Bartholomew, pursuant to act No. 59 of the extra session acts of 1870.

There are several defenses urged, but the most effectual one is, that on the tenth December, 1870, when the contract was made, out of which the relators' claim arose, no agreement could be made by the Board of Public Works, or any one else, to increase the amount of the State debt, because it already exceeded \$25,000,000, the limit fixed in the constitutional amendment then in force,

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State ex rel. Livingston & Guthrie v. Graham, Auditor.

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In reply to this defense the relators say that the constitutional amendment was not in force when the contract was made; that it did not go into operation until five days thereafter, to wit, the fifteenth December, 1870, when it was officially promulgated.

The joint resolution proposing the constitutional amendment was approved sixteenth March, 1870, and it is as follows:

"Be it resolved by the Senate and House of Representatives, in General Assembly convened, two-thirds of the members of each House agreeing thereto, that the following amendment of the Constitution of the State of Louisiana shall be submitted to the people of the State at the next general election for Representatives of the General Assembly, and if approved and ratified by a majority of the voters at said election, the same shall become part of the Constitution:

'Article —. That prior to the first day of January, one thousand eight hundred and ninety, the debt of the State shall not be so increased as to exceed twenty-five million of dollars.'

We think this amendment of the Constitution became operative from the day it was ratified by the people at the general election which was held on the first Monday of November, 1870. Constitution, article 147. But the relators contend that there is no evidence in the record that the constitutional limitation had been reached when they made the contract of the tenth December, 1870, with the Board of Public Works.

This fact need not be proved. It will be noticed judicially as a historical fact, which came to the knowledge of this court and was announced by it in the case of the State ex rel. Salomon & Simpson v. James Graham, Auditor, 23 An. 402. See authorities collated in Brightly's Federal Digest, page 365, sections 82, 83, 84, 85, 86, 87. As the State debt could not be increased at the time the contract was made, out of which the relators' claim arose, they hold no valid obligations of the State, and in our opinion the Auditor did not err in declining to issue to them the State warrants which they demanded of him.

Let the judgment appealed from be annulled; let the mandamus herein be disallowed, and let the relators' petition be dismissed, with costs of both courts.

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HOWELL, J., *concurring*. I prefer to place my concurrence in the decree of the court in this case, under the facts, on the ground that the relators have not shown a sufficient cause for the issuance of the writ of mandamus.

Act No. 59, approved March 5, 1870, and consisting of six sections, appropriated \$40,000, "or so much thereof as may be necessary," out of the internal improvement fund, to remove obstructions in Bayou

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Bartholomew ; ordered an examination of the stream, and plans and specifications, with estimates of the cost of the work, to be made by the engineer ; directed the Board of Public Works to advertise for proposals and award the contracts to the lowest bidder, the work to be completed by the first January, 1871, the bids not to exceed the estimates, bonds to be required, and the amounts to be paid by the treasurer out of the internal improvement fund, upon the warrant of the President of the Board of Public Works on the Auditor.

By section 9 of act No. 63, of the extra session of 1870, approved the fourth of April, the internal improvement fund was abolished, and the balance therein transferred to the " interest tax fund."

After this, to wit, on the tenth December, 1870, a contract purports to have been made by the Board of Public Works with the relators, under and by virtue of said act No. 59, for the work at certain prices, by the section, amounting to \$118,500 for the four sections, the estimates thereof appearing to be \$122,695.

On the twelfth January, 1871, the President of the Board of Public Works drew his thirteen warrants on the Auditor, in favor of the relators, for sums amounting to \$63,500, as the cost of the first and second sections. On these the sum of \$857 was paid, being all that was to the credit of the internal improvement fund, leaving the amount claimed in this proceeding.

In March, 1871, act No. 45 became a law, amending and re-enacting sections one, three and five, of act No. 59, of 1870, and by which the sum of \$40,000 and such additional amount, not to exceed the estimate of the engineer of the Board of Public Works, necessary to complete the removal of the obstructions in Bayou Bartholomew, were appropriated ; proposals to perform said work were to be advertised after receipt of the estimates provided for in section 2, of act No. 59, of 1870, and contracts awarded to the lowest bidder who would offer the best security to complete the work in a reasonable time, and upon the completion of each section and its acceptance by the engineer, payment was to be made on the warrant of the President of the Board of Public Works upon the Auditor in favor of the contractor, the act closing with this proviso : " that if any warrants have been drawn upon the internal improvement fund by the President of the Board of Public Works anterior to the date of the passage of this act as part payment of the work, the State Auditor of Public Accounts is hereby authorized and it shall be his duty to take up such warrants of the President of the Board of Public Works, and issue therefor his warrants upon the general fund of the State."

It is upon this proviso that the relators rely as imposing upon the Auditor the duty of taking up the warrants issued on twelfth January preceding its passage.

It is contended, and I think very properly, on behalf of the Auditor, that under the terms of the act No. 59, of 1870, no contract could be entered into, binding upon the State, for a sum exceeding \$40,000; and if it could, the proviso relied on is without effect, because no specific amount is appropriated, as required by article 104 of the Constitution.

If it be true that such an amount of work as represented in the claim, embracing forty-nine miles of the river, and worth \$63,500, was really performed by the relators within thirty-two days, they have not presented a case for a mandamus to compel the Auditor to issue any warrants in their behalf on the Treasurer. They have not shown a law which makes it the duty of the Auditor to issue a warrant for the specific warrants held or the sum claimed by them. The amendatory act of 1871 does not refer to their contract, but clearly contemplates the contracting and paying for the whole work, as first provided for in the first act. The proviso is drawn in unusual language for a law—"if any warrants have been drawn, etc," implying a doubt and leaving the whole matter to be determined by the Auditor, as to their existence, dates, amounts and the object of their issuance. Such language does not impose a duty which the Auditor is legally competent to perform.

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ON REHEARING.

HOWE, J. After further examination of this case a majority of the court are in favor, in the interests of justice, of remanding this cause, for the purpose of taking proof as to the amount of the State debt at the time this contract was made.

It is therefore ordered that the judgment heretofore rendered by us be set aside, that the judgment of the lower court be reversed, and the cause remanded for a new trial at costs of appellees.

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HOWELL, J., *dissenting*. I adhere to the opinion already filed by me herein, and I therefore dissent from the decree now rendered.

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WYLY, J., *dissenting*. I do adhere to the former decree rendered in this case.

The main ground set up in the petition and brief for rehearing was that the contract was made long prior to the tenth December, 1870, and the relators pressed the court to remand the case, in order to give them the opportunity to prove it.

I objected to granting the rehearing, and I now object to remanding the case, because the relators are precluded by their judicial admissions from showing that they made the contract prior to the tenth of De-

ember, 1870. In their petition we find the following allegation, which no court can ever permit the relators to contradict, to wit: "Petitioners aver that under and according to the provisions of said above recited act they contracted with the Board of Public Works, which contract was entered into between these petitioners and the Board of Public Works of the State of Louisiana, on the tenth day of December, A. D. 1870, a duly certified copy of which contract is attached, etc."

On the tenth December, 1870, the constitutional amendment limiting the State debt to twenty-five millions of dollars was in force. As a matter of history the court took notice that the State debt at that date largely exceeded twenty-five millions of dollars.

I do not believe the relators ever made a valid contract for the work; not a single requirement for letting out and making the contract according to act 59, of the acts of 1870, seems to have been complied with.

From the short time between the making of the contract and the reception of the work by the State Engineer—only about thirty days—I do not believe that sixty odd thousand dollars of work was done to improve the navigation of Bayou Bartholomew. I regard the case as having no merit whatever, and I will add, I believe the whole claim is a fixed up job to defraud the State out of a large sum of money. Act No. 59, to improve the navigation of Bayou Bartholomew, never authorized a contract to exceed forty thousand dollars. I regard the contract for one hundred and eighteen thousand dollars for that work as a deliberate fraud upon the State.

I therefore object to remanding this case, and I respectfully dissent from the judgment to that effect.

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No. 3733.—H. S. LOSEE v. L. A. SAUTON.

A purchaser of real estate at judicial sale must comply with the terms of his bid by paying the price before he can demand a title from the sheriff translativ of the property. If he fails to pay the price the property does not pass to him, and he can not maintain an injunction to stay its sale, when made by a creditor, on the ground that he is the owner.

**A**PPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. H. S. Losee*, in person, plaintiff and appellant. *M. Ryan*, for defendant and appellee.

**LUDELING, C. J.** This suit was commenced by an injunction to restrain the sheriff from selling the undivided half of a tract of land, under an execution issued in the suit of Sauton, tutor, v. W. J. Beatty, on the ground that the property belonged to the plaintiff. On the trial, the court of the first instance dissolved the injunction without



damages. The plaintiff has appealed, and the appellee has asked that the judgment be amended by allowing damages.

The plaintiff alleges that his title is derived from his purchase at sheriff's sale, under an execution against W. J. Beatty. It appears from the record that at that sale the plaintiff was the last and highest bidder, that the sheriff refused to make him a title because he thought he had erred in selling an undivided half of the property when he had advertised the whole for sale, and he had been enjoined from selling one undivided half thereof. On a rule taken against the sheriff he was ordered to make and deliver to the purchaser a title according to law, "on his paying the price."

Upwards of five months after this judgment had been rendered, the plaintiff in this suit having failed to pay the price, Sauton, tutor, caused an execution to issue against his debtor, Beatty, and the property previously knocked off to Losee, the plaintiff, was seized and advertised for sale. The claim of the tutor, Sauton, was secured by a legal mortgage on the property, and might have been proceeded against in the possession of Losee, if he had paid the price and received a title, which, however, he has failed to do. It is clear that Losee can not have a title to the property bid for by him at the sheriff's sale until he pay the price (2 La. 360); and it is equally clear that it was his duty to pay the price within a reasonable time after the judgment which ordered the sheriff to make him a title on his paying the price. The payment of the price is a condition precedent to his getting a title. C. P. 689.

In *Stout vs. Voorhies et al.*, this court said: "It is proper, however, to settle a previous question raised by the plaintiff's counsel relating to the right acquired by the bid of the former purchaser, although he did not immediately comply with the condition of the sale, which was cash. In support of this right, reliance is had on the articles of the Code of Practice, 690, 695, and on the articles of the Louisiana Code, 2588, 2590. The provisions of the Louisiana Code relate to sales by auction, both to voluntary and forced sales, but we are of opinion that the article 2589 is particularly applicable to voluntary sales, as is also the preceding article. The Code of Practice relates to sheriff's sales, and according to the articles cited an adjudication has the effect of transferring to the purchaser all the rights of the party in whose hands the property was seized, and the sheriff is allowed three days, within which he must make an act in form. This transfer of rights does not, in our opinion, take place, and consequently the officer is not bound to perfect the sale by an act translatif of them to the purchaser, unless the latter has complied with the conditions of such sale. The condition of the adjudication in the present instance was, that the purchaser should pay cash," etc. 4 La. 395; 3 La. 475. The plaintiff has

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made no offer to comply with his bid, and the sheriff did not have to put him in default. C. P. 689; Branner & Co. vs. Hardy et al., 18 An. 537. But the evidence shows that the sheriff told him he was ready to make him a title when he paid the price. We think the equitable remedy of injunction has been abused in this case, and the defendant is entitled to damages.

It is therefore ordered and adjudged that the judgment of the lower court be amended so as to give the defendant judgment against the plaintiff and John Bogan, *in solido*, for three hundred dollars, attorney's fees and costs of this appeal.

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WYLY, J., *dissenting*. The plaintiff, Losee, bought at sheriff's sale under the writ of W. H. Letchford & Co. vs. William J. Beatty, the undivided half of a plantation in the parish of Rapides, for \$366 66; but the sheriff refused to make him a formal deed, notwithstanding he tendered to him the price of adjudication. Losee then took a rule on the sheriff to compel him to make the deed, and in April, 1871, this court made the rule absolute, deciding that Losee was the lawful purchaser, and requiring the sheriff to make him the deed. For some cause the sheriff has neglected to make the deed, and Losee to pay the price. After several months had elapsed, L. A. Sauton, tutor, issued execution and seized the property which had been adjudicated to Losee under W. H. Letchford & Co.'s writ against Beatty, the common debtor. Losee enjoined the sale on the several grounds stated in the petition.

The court dissolved the injunction, and Losee appeals.

Losee contends that Sauton, tutor, who intervened and claimed the proceeds in the sale of Letchford, under which he bought, can not ignore his title, and seized the property as the property of Beatty; that he has never refused to pay the price, and has often urged the sheriff to make the deed pursuant to the decree of this court, being himself always ready and willing to pay the price.

On the other hand it is contended that since the return of the decree of this court requiring the deed to be made, the sheriff has always been ready to make the formal transfer to Losee, but that Losee has never tendered him the price.

The question is: can the title of the adjudicatee be treated as an absolute nullity, because for several months he has failed to tender to the sheriff the price, notwithstanding he did so immediately after the adjudication, when the sheriff refused to accept it and make him the deed, and notwithstanding the fact that since the rule has been made absolute requiring the sheriff to make the deed, the latter has never offered to do so, nor demanded the price?

Has the obligation of the buyer to pay the price, and the obligation of the seller to make the title, perished?

Can it be said that the adjudicatee who tendered the price and was refused a deed, and who subsequently obtained the decree of this court recognizing his title and commanding the sheriff to make the formal transfer, is bound again to make another formal tender of the price, and again to put the sheriff in default for the deed within a reasonable time, or else his title will be lost, notwithstanding it is shown that he has always been willing to pay the price whenever the sheriff shall tender him the deed in accordance with his duty and pursuant to the decree of this court?

It is well settled that the adjudicatee is not bound to make a formal tender of the price to the sheriff and put him in default for the deed, in order to preserve his rights under the adjudication. It is enough that he does not refuse to pay the price when called upon to do so by the sheriff.

The sheriff must offer to make the deed and put the adjudicatee in default for the price, in order to defeat the rights of the latter, resulting from the adjudication. The law is very clear on this point: "If the person to whom the property has been adjudicated shall refuse to pay the sheriff the price, or offer the proper securities when the sale has been made on credit, the sheriff may expose to sale anew the thing seized, and adjudicate it to another person." C. P. 689. "When the highest price offered has been cried long enough to make it probable that no higher will be offered, he who has made the offer is publicly declared to be the purchaser, and the thing sold is adjudicated to him." C. C. 2585. "This adjudication is the completion of the sale; the purchaser becomes the owner of the object adjudged, and the contract is from that time subject to the same rules which govern the ordinary contract of sale." C. C. 2586. "If the adjudication be made on condition that the price shall be paid in cash, the auctioneer may require the price immediately, before delivering possession of the thing sold." C. C. 2587. "If the object adjudged is an immovable, or slave, for which the law requires that the act of sale shall be passed in writing, the purchaser may retain the price, and the seller the possession of the thing, until the act be passed." \* \* \* C. C. 2588. "In all cases of sale by auction, whether of movables or slaves, or immovables, if the person to whom the adjudication is made does not pay the price at the time required, agreeably to the two preceding articles, the seller, at the end of ten days and after the customary notices, may again expose to public sale the thing sold, as if the first adjudication had never been made." \* \* \* C. C. 2529.

Now, whether a sale be made under article 689 C. P., or under the articles of the Civil Code just quoted, the rights of the adjudicatee can

not be defeated, unless he "shall refuse to pay the sheriff the price," or if he "does not pay the price at the time required." Here the adjudicatee, Losee, has never refused to pay the price, nor has he ever been required by the sheriff to do so.

"The effect of an adjudication under a *feri facias* is to transfer to the purchaser all the rights and claims of the party in whose hands it was seized; and the sheriff is bound thereupon to pass an act of sale to the purchaser, and to put him in possession of the property sold." 6 R. 100; C. P. 690, 691; C. C. 2589; 6 R. 107; 10 R. 30.

It was the duty of the sheriff charged with the execution of the writ under which the sale was made, to call upon Losee for the price. Until that is done, it can not be said that the latter has refused to pay the price, and that his rights resulting from the adjudication are lost.

This question was recently before the court in the case of Heirs of Doll vs. Katham, 23 An. 486, where, after a full examination of the authorities on the subject, it was held that "a purchaser of property at judicial sale acquires an indefeasible title by complying with his bid. In case of an active violation of the contract of purchase by the purchaser, or in case of open refusal to comply with his bid after demand, default is not necessary as a condition precedent to the action for the rescission of the sale and the recovery of damages. But if no demand has been made on the purchaser to comply with the terms of the sale, then and in that case a putting in default would seem to be a condition precedent to recovery."

Losee was examined as a witness, and he testified that "the sheriff never made a demand on me for the money, never put me in default in any manner; I have always been ready to pay that money, and am ready still. \* \* \* Immediately after the final decision of the Supreme Court was reported back to the clerk of the court in suit No. 1552, I went into the sheriff's office and said to Mr. De Lacy, sheriff, that the decision was back, and it was against him. I then requested him to make out the title papers as soon as he could make it convenient; that I was ready and willing to comply with the terms of the bid. \* \* \* Afterwards, on another occasion, I asked him whether he would prefer the money or a sight draft, and asked him if he had his papers made out, and he said no. I urged him to make them out and to let me know whether he wanted the cash for the bid or whether he would take a draft—to let me know so that I could send to the city and have the money brought up. He said he would see about it. I several times urged him and his deputy, Mr. Clements, to make out my title. \* \* \* I told him I was ready to comply with my bid, and wanted my papers. He said he did not know what he had to do in it until he saw Judge Ryan, counsel of Santon. I called his

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deputy, John Clements, and showed him in the clerk's office the order of the Supreme Court, and urged him also to make out the title."

On cross examination he said: " \* \* \* "I never actually showed the sheriff the money, or made a tender. When I first purchased the land, three years ago, I actually tendered the money to the sheriff, and he refused to make the title, but never since the Supreme Court decided he should make a title."

It is not pretended that the sheriff ever made out the title for Losee, although urged to do so; nor is there a particle of evidence showing that he ever demanded of Losee the price, and that the latter refused to pay it. Nor is it disputed that Losee tendered the price immediately after the sale, before he took the rule to compel the sheriff to make him a title. If article 2586 C. C., and article 690 C. P., mean what they say—that the adjudication completes the sale, and of itself alone has the effect to transfer all the rights and claims of the party in whose hands the thing was seized; and if this adjudication can not be defeated unless the purchaser "shall refuse to pay" the price, I do not see how the plaintiff, Losee, has lost his title, because he was undoubtedly the adjudicatee, and there is not a particle of evidence to show that he has refused to pay the price. Having tendered the price immediately after the adjudication, he was not bound to do so again. It was the duty of the sheriff to make him the deed, as commanded by this court. This he has never done, nor has he demanded the price. In view of the facts of this case, and the authorities to which I have referred, I do not believe that Losee's title should be treated as an absolute nullity, and I therefore dissent.

Rehearing refused.

#### NO. 3776.—HEIRS OF JACOB HOOVER v. YORK AND HOOVER et als.

The omission of a notary public in writing a nuncupative will by public act, to use the expressions "as dictated," is not good ground for annulling the will. These expressions are not sacramental, and if the notary uses other language which conveys the same idea, the will is not void because these expressions are not used.

An illegal disposition in a will to a legatee by particular title does not destroy or impair the rights of the legatee by universal title.

A particular legacy that has lapsed, because of the incapacity of the legatee to take, ensures to the advantage of the universal legatee.

**A**PPPEAL from the Thirteenth Judicial District Court, parish of Concordia. *Hough, J. George S. Sawyer*, for plaintiffs and appellees. *O. Roselius, Ogden, Sparrow and Henry B. Shaw*, for defendants and appellants. *Mayo & Spencer*, for Ober & Atwater.

**WILY, J.** The motion to dismiss this appeal is denied, because, if the bond is not sufficient for a suspensive appeal, being for the amount fixed by the judge, it is good for a devolutive appeal.

In August, 1859, Jacob Hoover died, leaving a large estate; and having no forced heirs he instituted Zebulon York and E. J. Hoover his universal legatees, bequeathing to them his entire property, in a nuncupative will by public act executed before — Gottschalk, notary, in the city of New Orleans, on the twenty-sixth of January, 1859. The will was duly proved and ordered to be executed, and the said universal legatees were recognized and put in possession of all the property left by the deceased.

The estate consisted mainly of the White Hall, the Home and the Marengo plantations in the parish of Concordia, together with some five hundred slaves and the movable property employed on said plantations.

The said universal legatees sold the Marengo plantation to James T. Organ in January, 1866; he subsequently conveyed it to Wm. Shorter. In 1866 they mortgaged the balance of the property to Ober, Atwater & Co., to Alexander Allen and to the firm of Wright, Allen & Co., for sums amounting in the aggregate to upwards of \$200,000.

On the twenty-seventh of May, 1868, Zebulon York and E. J. Hoover were declared bankrupts by the United States District Court. They surrendered as their property the White Hall and Home plantations. This property was sold by order of the Bankrupt Court, and was adjudicated to Albert G. Ober, who is now in possession as owner, jointly with Frank D. Atwater.

On the thirteenth of December, 1859, the plaintiffs claiming to be the legal heirs of Jacob Hoover, deceased, brought this suit against York and Hoover, the universal legatees, to recover the property left by the deceased, and to annul his will.

The grounds of nullity are, that the will was not executed with the formalities prescribed by article 1571, Civil Code; especially there is no express mention that the testament was written by the notary "as dictated" by the testator, and also that the recitals of the notary are untrue.

The testimony of the notary, and also of the three attesting witnesses, shows beyond doubt that the recitals of the will are true.

Article 1571, Civil Code, provides that, "The nuncupative testaments by public act must be received by a notary public, in the presence of three witnesses residing in the place where the will was executed, or of five witnesses not residing in the place.

This testament must be dictated by the testator, and written by the notary as it is dictated. It must then be read to the testator in the presence of the witnesses.

Express mention is made of the whole, observing that all those formalities must be fulfilled at one time, without interruption and without turning aside to other acts.

It must appear by the act itself that the formalities required by law have been complied with.

The main ground of the plaintiffs is, that there is no express mention that the will was written "as dictated."

There is no particular virtue in the words "as dictated;" they are not sacramental; any language conveying plainly the same idea is just as good.

The will before us declares that Jacob Hoover, in the presence of the witnesses, appeared before the notary, and "did require of me, notary, to receive his last will, which he thereupon immediately dictated unto me in the presence of the above named witnesses, in the following words to wit: "My name is Jacob Hoover. I am a native of Jackson county, in the State of Georgia. \* \* \* My father and mother are both dead. I was never married and have no children. I give and bequeath unto Elias J. Hoover and Zebulon York, both residing in the parish of Concordia, all my real, personal and mixed estate, and property of whatever nature or kind, and wheresoever situate; the whole consisting of \* \* \* \* \*  
Moreover, I nominate and appoint the said E. J. Hoover and Zebulon York to be my testamentary executors and detainers of my estate, with full power to regulate the same without the intervention of justice. I hereby revoke all wills and testamentary dispositions heretofore made, holding these presents alone for valid. Thus the foregoing will has been dictated to me, notary, by the said testator, in the presence of the above named witnesses, and I have written the same in their presence immediately, without interruption or turning aside to other acts, and in my proper handwriting, and having read said will to said testator in a loud and audible voice, in the presence of said witnesses, he declared unto me in their presence that he perfectly and fully understood the same, and persisted therein." This done and passed \* \* \* \* \*

We think the formalities required by article (C. C.) 1571, are fully complied with in the will before us.

Here the notary states that the testator appeared and "*did require of me, notary, to receive his last will, which he thereupon immediately dictated to me \* \* \* in the following words to wit:*"

The dispositions of the testator are then written, and the notary concludes as follows:

"*Thus the foregoing will has been dictated to me, notary, by the said testator, \* \* \* and I have written the same immediately.*"

If the will was dictated by the testator and written in his own words immediately, it must have been written as dictated.

There is no force, therefore, in the position that the formalities of law have not been observed in making the will. On this ground alone its nullity was sought in the original petition.

But after York and Hoover, the original defendants, had mortgaged White Hall and Home plantations for more than they were worth, and finally surrendered them in bankruptcy, and after they had been purchased by Ober & Atwater, mortgage creditors of said York and Hoover, Elias J. Hoover informed the attorney of plaintiffs that he and York never had a valid title to the property left by Jacob Hoover, because there was a counter letter, which is now lost, which contained the real purpose of the testator. It was his real purpose to put the property in the hands of York and Hoover, as trustees. They were to hold the property for the real beneficiary heir, James Hoover, an illegitimate son of the deceased by his colored concubine and slave, Lydia; that this child, about two years old at the death of Jacob Hoover, was to receive all the property from said York and Hoover on arriving at twenty-one years of age, and they were merely parties interposed.

On the eighth of May, 1870; the plaintiffs amended their petition, propounding this new ground of nullity, and citing Norton, the assignee of York and Hoover, and also Ober & Atwater, the purchasers of White Hall and Home plantations.

No one ever saw or heard of the pretended counter letter but York and Hoover.

We have no hesitancy in saying that the witness, Elias J. Hoover, from his acts and his contradictory oaths contained in the record in reference to the property in dispute, is utterly unworthy of credit in a court of justice. He obtained a large amount of money from the defendants, Ober & Atwater, and also from other parties on the faith of his deliberate declarations in acts of mortgages that he was the joint owner of the property; and finally, to get relief from his creditors he voluntarily goes into bankruptcy with York, placing White Hall and Home plantations on the schedule as their property, and swearing to the correctness thereof.

He has made two contradictory oaths as to the missing counter letter, one of which he voluntarily furnished the counsel of the plaintiffs when they amended their petition on the eighth of May, 1870, and the other at the trial. He is evidently anxious for his relatives and co-heirs now to recover the property, after realizing himself all he could out of it, and after practicing a deliberate fraud upon Ober & Atwater, and other parties.

But assuming the statements of York in reference to the counter letter to be true, let us inquire what effect it had upon the title of York and Hoover to the property in dispute, to which Ober & Atwater have succeeded, so far as concerns White Hall and Home plantations, and to which Wm. Shorter has succeeded, so far as concerns the Marengo plantation.



York gives the following as the substance of the missing counter letter, viz.:

"The counter letter contained, as near as I can recollect, the following words, to wit: 'I, Jacob Hoover, do desire and wish that the proceeds resulting from the annual sales of my cotton crops shall be disposed of: *First*—In purchasing servants, slaves and mules, to cultivate all the vacant land or uncultivated lands on White Hall and Home Place; and further, to build houses for said servants, and stables for said mules, and generally to improve said plantations by putting them in the best possible repairs. *Second*—After White Hall and Home Place have been put in the best repairs as above stated, then the annual net revenues shall be at the disposal of Z. York and Elias J. Hoover, as they may decide in their own judgment, either in purchasing city lots, Texas land, or desirable plantations in this State. Should the said Z. York and E. J. Hoover find it, in their opinion, necessary to mortgage any of my property, I wish them to do so, *to procure money, at a low rate of interest, from any bank or commission merchant, to carry out their investments or perfect their purchases.* *Third*—My boy Jimmy, or James Hoover, I wish and do desire to have sent to school, and no means or expenses spared in having him thoroughly educated. And when he shall arrive at the age of twenty-one years, I desire and wish that said Z. York and E. J. Hoover shall turn over and put him in possession, of his own right, White Hall and Home Place; that is, should he be capable of protecting and not squandering the same. Should he, James Hoover, at the age of twenty-one, be a reckless man or an imbecile, I request that none of my property be put in his possession; but Z. York and E. J. Hoover shall amply provide for his support and maintenance. In case of the death of my son, James Hoover, and my woman Lydia shall be the mother of no more children during my lifetime, all my property shall belong absolutely to Z. York and E. J. Hoover. Agreed to and signed this twenty-seventh day of January, 1859.'"

This witness also states that neither he nor E. J. Hoover ever exerted any influence on Jacob Hoover to make his will; he "don't think any body on earth could have influenced him to do otherwise than he desired." He also states that "Elias J. Hoover and witness were to judge, when the boy came of age, whether he was capable of taking and managing the property.

There was no event or contingency mentioned in that counter letter upon which the boy James was to receive from us other property than the White Hall and Home places."

It will be observed that by the counter letter the testator did not intend that his illegitimate son by his slave Lydia should be his universal legatee, because "there was no event or contingency mentioned

in that counter letter upon which the boy James was to receive from us (the universal legatees) other property than the White Hall and Home Place." If the disposition in favor of this illegitimate child had been embodied in the will (and it can have no greater effect in the counter letter) it would be no cause to annul the will. The lapse of a particular legacy by reason of the incapacity of the party to take, enures to the advantage of the universal legatees. An illegal disposition to a legatee by particular title does not destroy the will; it can not defeat the right of the heirs by universal title. That Elias J. Hoover and Zebulon York were the universal legatees of Jacob Hoover, deceased, there can be no doubt.

The value of the property left by the deceased exceeded a million of dollars. By the terms of the will Elias J. Hoover and Zebulon York were instituted heirs by universal title. They were not merely parties interposed. They were to be the owners of this vast estate, except, perhaps, the White Hall and Home Place, which they were to turn over to the boy James when he arrived at the age of twenty-one years, provided "he be capable of protecting and not squandering the same," and of this the said universal legatees were to be the sole judges.

Whether James was to get White Hall and Home Place depended on several conditions, viz.:

*First*—That he should live to be twenty-one years of age.

*Second*—That he be judged by the universal legatees on arriving of age to be capable of protecting and not squandering it; and of this said legatees were to be the sole judges.

All the other property was bequeathed to York and Hoover unconditionally, and the part intended for James was also to be theirs, provided certain conditions should not happen.

"Every disposition in favor of a person incapable of receiving shall be null, whether it be disguised under the form of an onerous contract or made under the name of persons interposed." C. C. 1478.

"The testamentary disposition falls when the instituted heir or the legatee rejects it, or is incapable of receiving it." C. C. 1696.

"The legatees under a universal title, and legatees under a particular title, benefit by the failure of those particular legacies which they were bound to discharge." C. C. 1697.

"Whenever a legacy falls for incapacity of the legatee, the universal legatee takes it to the exclusion of the collateral heirs at law."

\* \* \* Prevost vs. Prevost, 10 R. 513.

The lapse of the particular legacy in favor of the boy James by reason of his incapacity, inured, therefore, to the advantage of York and Hoover, the universal legatees, and not to the plaintiffs, the collateral heirs at law of Jacob Hoover, deceased.

Our conclusion is that York and Hoover acquired by the will of Jacob Hoover a good title to all the property left by him.

We think the court *a qua* erred in giving judgment for the plaintiffs and against the defendants, Albert G. Ober and Frank D. Atwater, the owners of White Hall and Home plantations, and that it did not err in giving judgment against the plaintiffs and in favor of Wm. Shorter, the owner of the Marengo plantation.

It is therefore ordered that the judgment in favor of Wm. Shorter and against the plaintiffs be affirmed with costs; it is ordered that the judgment in favor of the plaintiffs and against the defendants, Albert G. Ober and Frank D. Atwater, be annulled; and it is now ordered that there be judgment for these defendants recognizing them as the legal owners of White Hall and Home plantations, and rejecting the demand of the plaintiffs with costs of both courts.

Rehearing refused.

NO. 3653.—BYRON JOHNSON v. STEPHEN DUNCAN.

24 381  
107 812

A purchaser of mortgaged property at judicial sale is bound to retain in his hands the proportion of the price coming to a concurrent mortgage note, not embraced in the judgment under which the sale is made, and to deliver such proportion to the holder of such note. As to the purchaser no reinscription of the mortgage is necessary, because he has by the purchase assumed the debt to the extent of the proportion of the purchase money, which he must retain. The plea of peremption will not therefore avail him in a suit by the holder of the note to compel him to pay, because, having assumed the debt, reinscription of the mortgage is unnecessary.

**A**PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. A. H., H. N. and W. F. Ogden*, for plaintiff and appellee. *William Grant*, for defendant and appellant.

**HOWELL, J.** The main facts in this case, essential to its proper decision, seem to be the following:

In 1867 the plaintiff was the owner and holder of a mortgage note for \$2000, with some years arrears of interest, secured on a plantation in the parish of Concordia. This note was one of a concurrent series secured by the same act, and amounting in capital to the sum of \$31,000.

On the second of March, 1867, the mortgaged property was sold under foreclosure at the suit of S. Duncan (the elder), the holder of those other notes, and purchased by S. Duncan (the younger), the defendant in this action, for the appraised price of \$33,395 75, an amount somewhat less than the sum due on all the notes in principal and interest.

The defendant was bound to retain in his hands for the benefit of the plaintiff's note, the *pro rata* of the price coming thereto by law, and to pay the same with interest when demanded. 21 An. 499; 14 An. 149.

We do not think he was bound for any more than this, but judgment to this extent may be properly given under the pleadings and evidence; and this view renders it unnecessary to pass upon many technical points presented in the argument.

The principal defense urged is that of peremption. The defendant contends that the mortgage was first recorded in 1859, and was not reinscribed, and that the plaintiff, whose suit was not instituted till 1871, lost his rights against defendant by peremption. This, we think, an error. The obligation of defendant springs from his purchase, and the duty of retaining in his hands the proportion of price coming to a concurrent mortgage note not embraced in the judgment under which the sale was made, and to deliver such proportion to the holder of such note. An hypothecary action is provided against him. C. P. 909; 16 La. 163; 5 An. 306. As to him, the mortgage of the concurrent creditor requires no reinscription, for he has assumed the debt to the extent of its proportion of the purchase money, which he must retain. 4 Rob. 44, *Noble v. Cooper*.

The court *a qua* gave judgment in favor of plaintiff for the whole amount of his note with interest. Upon the principles quoted above, it should have been for the *pro rata* of the price bid by defendant.

It is therefore ordered that the judgment appealed from be amended so as to reduce the same to the sum of two thousand two hundred and nine dollars, with eight per cent. per annum interest, from March 2, 1867, and costs of the lower court, and that plaintiff pay costs of appeal.

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e1091084

NO. 3831.—WILLIAM A. ELMORE v. FLORENCE A. VENTRESS, Administratrix, and JAMES A. VENTRESS, Executor. (Consolidated).

The prayer of oyer of a promissory note, and for general relief by an executor in a suit against the estate he represents, interrupts prescription on the note.

A citation that is defective by being addressed to a person individually in a suit where such person occupies the representative capacity of administrator, is cured by such person appearing in his representative capacity and answering to the merits.

The estate of the payee and indorser of a promissory note is not liable thereon, unless legal notice of the dishonor of the note has been given.

Where real property belonging to an estate is covered by a special mortgage which contains the pact of non-alienation, it may be seized and sold under executory process, without the delay of awaiting the due course of administration.

**A** PPEAL from the District Court of Iberville. *Posey, J. Elmore & King*, for plaintiff and appellee. *Barrow & Pope*, for defendants and appellants.

Howe, J. These consolidated suits were instituted to recover from the estates of John M. Brown and James N. Brown the amount of certain notes due for the unpaid price of a plantation and slaves, in the parish of Ascension.

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Elmore v. Florence A. Ventress, Administratrix, and James A. Ventress, Executor.

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John M. Brown was maker of the notes, and James N. Brown was payee and indorser of one of them.

There was judgment for the plaintiff, and defendants appealed.

I. The plea of prescription is not well taken. The petitions of plaintiff were filed before prescription occurred, and were directed against the defendants in their representative capacity. Citations were also issued and personally served, with copies of these petitions, on the defendants personally. James A. Ventress, as executor of J. N. Brown, appealed and prayedoyer and for general relief before the time when it is pretended that prescription accrued, which disposes of the question as to that estate.

The citation to the estate of John M. Brown was informal, being addressed to Florence A. Ventress, instead of to Florence A. Ventress, administratrix; but without excepting she afterwards appeared as administratrix and answered to the merits. The curative power of this answer we think related back to the time when she was personally served with the petition containing a demand on the estate, and with a citation which, though informal, plainly required that plaintiff's demand should be answered by such estate.

II. There is no proof, however, of any notice of dishonor to J. M. Brown. and as he was payee and indorser of the note in respect to which his estate is pursued, notice should have been given. The judicial averment by his executor that he was a surety does not change this rule, which was plainly recognized in *Breaux v. Leblanc*, 10 An. 97, and *Ball v. Greaud*, 14 An. 303. As to the estate of J. N. Brown there should be a non-suit.

III. The relative proportion between the value of land and slaves sold seems to have been correctly fixed by the judge *a quo*.

IV. The questions raised by the answer as to the disquieting of possession by a suit of Mrs. Gaines were correctly disposed of, as we had occasion to decide lately, in the case of *Sigur v. Ventress et al.*

V. The mortgage contained the pact of non-alienation, and executory process might have issued. *A fortiori*, then, the court *a qua* did not err in giving judgment in this ordinary action in such way that it may be executed against the property mortgaged, by writ from the District Court, without the delay of awaiting the due course of administration.

It is therefore ordered that the judgment appealed from be affirmed, except as to the estate of J. N. Brown; that as to the claim against the latter, as indorser, there be judgment of non-suit, and that the costs of appeal be divided between the plaintiff and the estate of John M. Brown.

Rehearing refused.

*Thompson v. New Orleans Coast and Lafourche Transportation Company—Brown, Garnishee.*

**No. 2616.—J. F. THOMPSON v. NEW ORLEANS COAST AND LAFOURCHE  
TRANSPORTATION COMPANY—JOHN J. BROWN, Garnishee.**

A person who bought a steamboat from a person within the rebel lines of military occupation during the late war, for a certain price in unlawful currency, and afterward sold the vessel to another party within the Federal lines, and received the price in lawful currency, can not be compelled by garnishment process to pay the price he thus received to the original owner, on the ground that the original sale was made in violation of the laws of war, and was therefore void. Nor can the plaintiff recover on the theory that the proceeding was a revocatory action by garnishment, because such action can not be maintained in that form.

**A** PPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. J. Ad. Rozier*, for plaintiffs and appellee. *G. Schmidt*, for garnishee and appellant.

Howe, J. There was judgment in this case in the court below, maintaining the traverse to the answers of garnishee Brown, and condemning him to pay to plaintiff the sum of \$8584 60 with interest, and the garnishee has appealed.

A large number of points have been made and discussed, of which it is necessary to notice but one.

The theory of the plaintiff's claim against the garnishee seems to be this: that in 1863 the defendant's company was owner of the steamboat Lafourche; that in that year the Board of Directors in New Orleans authorized a sale of the boat, which was then outside the lines of military occupation of the United States forces; that an agent was thereupon sent through the lines, who sold her to the garnishee for \$50,000 in Confederate notes; that the garnishee, in January, 1867, sold her to the Bayou Sara Packet Company for \$32,000 in lawful money; that the sale in 1863 by the defendants' company to the garnishee was null and void, as in violation of the laws of war and the restrictions on commercial intercourse; that when the garnishee, five years after, sold her to the Bayou Sara Packet Company she was still the property of the defendant's company, and the price he received was due and owing by him to the defendants.

It appears that from the time of the sale to him in 1863 to the time of the sale by him in 1867, the garnishee (Brown) was in quiet possession as owner, the bill of sale to him being recorded in the New Orleans Customhouse.

The garnishee excepted to the right of the plaintiffs to attack him by a process of garnishment, which is really a revocatory action in disguise, and he also pleaded the prescription of one year.

If this be a revocatory action in the disguise of a garnishment, the exceptions of the garnishee should have been maintained. 19 An., page 16.

If, on the other hand, we proceed upon the theory of the plaintiff, that there was no sale to Brown by the company; that he sold their

Thompson v. New Orleans Coast and Lafourche Transportation Company—Brown, Garnishee.

property in 1867, and owes them the price, and that this debt can now be seized by plaintiff, we find that the facts of the case will not support the theory.

There was a quorum of the defendant's directors when the sale was determined on in 1863. The sale, after being made, was ratified by a meeting of the stockholders. It was made as matter of fact, and recorded in the Customhouse; and the garnishee never heard any objection to it until March, 1868, when he was cited to answer the additional interrogatories in this case. The dealings across the lines may have been unlawful, but the defendants, the vendors, could not plead their own unlawful conduct, nor can the plaintiff, seizing their rights merely, plead it. *Melior est conditio possidentis*. If creditors are permitted, on behalf of their debtors, to disregard every sale made since 1861, which may have been concluded in contravention of the laws of war, the regulations of the United States Treasury, or the public policy of the country, a vista of litigation would be opened which it would be melancholy indeed to contemplate.

It is ordered that the judgment appealed from be reversed, and the traverse and other garnishment proceedings dismissed with costs in both courts.

Rehearing refused.

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No. 3859.—P. O. HEBERT, Tutor, etc., v. J. G. WINN et als.

24	385
121	832

A person addicted to intemperance and subject to consequent fits of mental derangement, may make a will, if he be *compos mentis* at the time, and the burden falls upon those who assail such a will to show the existing insanity or incapacity of the testator at the time. A capricious bequest in a will does not constitute proof of insanity in the testator.

Where a will has been made by a citizen of this State, while in another State of the Union, and has been admitted to probate there, or elsewhere before a court of competent jurisdiction, the presumption is that the will was executed and probated in accordance with the law of such State or place, and the party who attacks it, whether directly or indirectly, must defeat such presumption by sufficient proof.

**A** PPEAL from the Parish Court of Iberville. *Adonis Petit*, Parish Judge. *Mathews & Robertson*, for plaintiff. *Sims, Barrow & Pope*, and *A. & E. B. Talbot*, for defendants.

HOWELL, J. A motion to dismiss this appeal, on several grounds, accompanies the record, but does not seem to be urged by the movers. An examination of the grounds, however, satisfies us that they are insufficient. The delay in filing the transcript arose from the necessity of the appellants to take out a mandamus upon the clerk of the lower court. The parties are all properly before the court, the appeal brought up having been taken on motion in open court at the same time when the judgment was rendered, and the appeal bond is in due form and signed by the security.

Motion refused.

## ON THE MERITS.

Paul O. Hebert, tutor of his minor children, sues to annul the will and the probate of the will of George C. Vaughan, their maternal uncle, on the grounds of imbecility, insanity, and the want of capacity to dispose, arising from habitual drunkenness, and of the want of requisite legal forms.

I. It is contended that the testator was of unsound mind and notoriously insane on the sixth May, 1861 (the date of the will), and incapable of disposing of his property by will or otherwise, and that Everard G. Winn, his maternal uncle, for the purpose of evading the laws of Louisiana, and with a knowledge of his incapacity, took him to another State, among strangers, where he extracted the pretended will from him.

The evidence is abundant that during the last ten years of his life Vaughan was an habitual drunkard, and subject to not infrequent attacks of *mania a potu*, but it does not satisfy a majority of the court that he was drunk and of unsound mind on the day when the will was executed. The four members of the family at whose house it was made, are positive as to this point, and the circumstances do not countervail their testimony. One addicted to intemperance, and subject to consequent fits of derangement may make a will, if he be *compos mentis* at the time. 15 La. 88. It is incumbent on those who assail such a will to show the existing insanity or incapacity at the time, which has not been done in this case. It is shown that Vaughan was a man of at least fair education, and when sober exhibited ordinary intelligence and good deportment. He was in the habit of hunting and fishing, and of visiting in the neighborhood where he was raised, and in the State of Tennessee. Some of the young men among whom he grew up, and with some of whom he was at school, speak of him in very favorable terms, when sober. As said in the case of *Hart v. Thompson's executor*, above cited, in which drunkenness was a ground for action: "The impression made on our minds by the whole testimony on this head is, that even admitting the general insanity of the deceased, which is by no means satisfactorily proved, there is abundant evidence that he was *compos mentis* and fully competent to make a will at the time he made it."

Nor is there proof of any undue influence or fraudulent practices on the part of his uncle, E. G. Winn, to evade the laws of this State and extract the will from him as alleged. The circumstances of their leaving Louisiana together, the making of the will while absent, and their return to the State, as detailed in the record, are rather inconsistent with design, and are not such as to invalidate a will. Winn was the brother of Vaughan's mother, a wealthy lady, had managed her large



property for many years, and was kind and attentive to his intemperate nephew. While it appears that the relations between the testator and his brother-in-law, P. O. Hebert, were not of the kindest. The testimony of the Gillens shows that the making of the will was Vaughan's voluntary act, when Winn does not appear to have been present. "The influence to vitiate the act must amount to force and coercion destroying free agency; it must not be the influence of attachment or affection; it must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act; further, there must be proof that the act was obtained by this coercion—by importunity which could not be resisted." Jannin on Wills, 114.

The fact that the will was made while the two were out of the State and after the testator had recovered from one of his attacks of delirium tremens, is no proof of an intention to evade the laws of this State. The dispositions of the will are not in conflict with our laws, the dictates of nature or the attachments of the testator.

It is urged, however, that the will itself contains internal evidence of his insanity, in that he left a legacy of \$5000 to Miss Missouri Gillen, a stranger of but two days acquaintance. On this point the father of the legatee says: "When he, the testator, said he wished to give Missouri Gillen \$5000, I stopped writing, and told him she was not entitled to \$5000. He then said that my family had been very kind to him, and that it was none of my business, for he was able to give her \$10,000 and not hurt him. Then I wrote the clause."

This may be evidence of caprice or a sudden generous impulse of gratitude, but not of insanity. Very many wills would be annulled if such capricious bequests are proof of insanity. The law does not enter so suspiciously into the motives for every bequest in order to set aside a will.

II. The said will should be governed by the laws of Louisiana; it has not been proved as required by Louisiana law, and it is not shown to be executed or probated according to Arkansas law, which, not being offered in evidence, must be presumed to be like our own.

By art. 1596 R. C. C. testaments made in foreign countries, or in the other States or Territories of the Union, take effect in this State, if they be clothed with all the formalities prescribed for the validity of wills in the place where they have been respectively made.

In the succession of McCandless, 3 A. 580, the benefit of this provision of law was accorded to a citizen of this State, who made his will in another, during his temporary absence from this, and afterwards returned and died here—there being no disposition made contrary to our law and the policy of our State. And it seems to be settled that, when a will is once admitted to probate in a court of compe-

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Hebert, Tutor, etc., v. Winn et als.

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tent jurisdiction in this or another State or country, it creates, *prima facie*, a presumption that the will was executed and probated in accordance with the law of such place, and the party who attacks it, whether directly or indirectly, must defeat such presumption by some sufficient proof. 5 N. S. 48; 6 R. 239; 13 An. 575; Const. U. S., art. iv. § 1.

By arts. 1688 and 1689 R. C. C. testaments made in foreign countries and other States of the Union, can be carried into effect on property in this State, upon being registered in the court of proper jurisdiction and its execution ordered by the judge; and this registry or order will be authorized by the production of a duly certified copy of the proceedings and evidence in proof of the will and probate. 13 L. 221; 17 L. 4, 846; 2 R. 427. All this seems to have been done in this instance.

Our conclusion is that plaintiffs have not successfully assailed the will, and the probate of the will, of George C. Vaughan, and that the judgment appealed from should be reversed.

It seems that Missouri Gillen, the special legatee, did not prosecute her appeal, and being an appellee we can not correct the judgment as to her and her co-appellees.

It is, therefore, ordered that the judgment appealed from be reversed, and that there be judgment in favor of the heirs of Edward G. Winn herein, the universal legatees of George C. Vaughan, deceased, dismissing and rejecting the demand of plaintiffs; that the will of the said George C. Vaughan be decreed to be valid, and the said heirs of Winn, to wit, Independence G. Winn, Mary Winn wife of Henry Davis, and Alexander Winn and Cordelia Winn, represented by their natural tutrix, Mary Montgomery, widow of Edward G. Winn, be recognized as the universal legatees of the said George C. Vaughan, and entitled to the possession of all of his estate under said will. Costs of the lower court to be paid by the plaintiffs—those of appeal, by the appellees.

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LUDELING, C. J., *dissenting*. I dissent from the opinion of a majority of this court in regard to the capacity of George C. Vaughan to make a will on the sixth of May, 1861.

In my opinion the proof greatly preponderates in favor of the position that George C. Vaughn was an imbecile at the time, before and after he made the will, *if he made it*.

It is proved that for years before his death he was almost always drunk, and that he had several attacks of *mania a potu*; and the effort of the defendants in the court *a qua* seemed to be to find some one who had ever seen him when not under the influence of liquor. It

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Hebert, Taylor, etc., v. Winn et al.

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is proved that in the latter part of the month of April, 1861, he had a violent attack of *mania a potu* while in the city of Memphis, and that he was attended then by Doctors Yandell and Erskin. They state that after his recovery from said attack he was weak, mentally and physically, and that up to the period when they last saw him, the first of May, 1861, he was not capable to make dispositions of his property. The will was made on the sixth of May.

Dr. Hall, who had been the family physician of Vaughan's mother, says he attended Vaughan several times when he had *mania a potu*, that he had known him many years before his death, and that for years before his death he was an imbecile, incapable of attending to any business. This evidence is corroborated by the testimony of Crowell, Cocker and Mrs. Cocker, Hebert, Besson and others. And several of the witnesses mention acts done by Vaughan, when apparently sober, which indicated want of capacity to transact the most ordinary business.

The evidence further shows that, after the death of the mother of Vaughan, E. Winn, the maternal uncle of Vaughan, said he would see to it that George C. Vaughan's share of the mother's property should go to his own children. The Gillen family testified that they did not know George C. Vaughan before he was brought to their house; that they had never heard of him until their uncle told them he was going to Memphis to bring him to their house. They testify that he was brought to their house on the third of May. Mrs. Gillen says she can not tell whether he was then drunk or not; that he was *nervous* and was sick, and that he remained nervous for three or four days after his arrival at their house. The will was made on the sixth of May, and Vaughan appears to have left their house shortly afterwards, for he is shown to have been in New Orleans about the fourteenth of May, drunk, dirty and ragged, and to have continued drunk until the attack of sickness of which he died, in June. The only witnesses who attested the will who testified in this case, are the members of the Gillen family, in favor of one of whom a legacy of five thousand dollars is made in the will. All the other witnesses are said to be dead or to have left the country, and the *original will* itself could not be found in the office in Arkansas, where it should have been if in existence. Why was George C. Vaughan taken from Memphis, in the condition he was in, to Gillen's landing, an obscure place, where a few wood-choppers and levee builders were staying? And why should he have employed Gillen to write his will when it appears from Gillen's own testimony that he was instructed by Vaughan as to the requisites of the will by the laws of Louisiana? And why the bequest of five thousand dollars in favor of Missouri Gillen, whom he had never met until a day or two before? It requires more credulity than I possess to believe that the will was the

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voluntary act of George C. Vaughan. While, on the other hand, the evidence satisfies me that he had not the necessary capacity to make a will on the sixth of May, 1861.

I concur in the dissenting opinion of the Chief Justice in this case.

JAMES G. TALIAFERRO.

Rehearing refused.

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No. 2623.—J. N. SHAWHAN v. J. J. CLARKE.

A person owning a horse and buggy is not responsible to another for the damage caused by his horse running away with the buggy and running against another horse and buggy, if the running away of his horse was not caused by his carelessness or negligence, but was caused by some other person or agency over which he could exercise no control.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Oooley, J. Hornor & Benedict*, for plaintiff and appellee. *Budd & Grover*, for defendant and appellant.

**HOWELL, J.** Plaintiff claims one thousand dollars as the value of a horse which died of injuries inflicted by a buggy and horse belonging to the defendant, and through his negligence. The defendant, besides the general issue, averred that at the time his team was properly secured and attended to, and that a runaway horse and buggy came into collision with his, breaking his buggy and causing his horse to break loose and run.

The evidence shows that each party had placed his horse and buggy not more than twelve or fifteen feet apart in the place allotted for such purposes in the Fair Grounds, and each in charge of a boy or lad—the defendant having his animal also tied to a tree. Not long afterward, and while each of said teams was stationary and quiet, a third party, driving a horse and buggy rapidly, ran against the buggy of the defendant, injuring it and the harness, and causing the horse to break his fastenings, and in the fright ran suddenly against the plaintiff's horse, inflicting a wound with the shaft of the buggy, which resulted fatally.

Under this state of facts the defendant was not guilty of negligence or fault, and he does not, therefore, come within the application of articles 2315 and 2316 of the R. C. C. His animal was not vicious or unruly, was not running at large, but was fastened with at least ordinary care in the usual place, and where the plaintiff and others had put theirs. The collision produced by the horse and buggy of the third party, as asserted, was well calculated to frighten the defendant's horse, and we do not think he can be held as guilty of negligence or fault in not having a horse that would not act as his did under the circumstances. The striking against defendant's buggy, the breaking

Shawhan v. Clarke.

loose of his horse and running against that of plaintiff's, are described as all occurring so suddenly and quickly that the persons nearest by could not prevent the injury complained of. The unknown driver of the horse and buggy which struck defendant's seems to have been the cause of the disaster, and the defendant, it seems, endeavored to discover this person without success.

This case does not come within the provisions of article 2321 R. C. C. cited by plaintiff's counsel.

It is therefore ordered that the judgment appealed from be reversed, and that defendant have judgment in his favor with costs in both courts.

Rehearing refused.

No. 2661.—HULDA L. STANTON, Administratrix, v. HENRY S. BUCKNER.

One partner of a commercial firm can not maintain an action against another partner for a specific sum of money alleged to be due on account of partnership transactions. The remedy in such a case is to sue for a liquidation of the partnership. 13 An. 576; 21 An. 582; 22 An. 439.

**A**PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Semmes & Mott*, for plaintiff and appellee. *Lea, Finney & Miller*, and *James B. Eustis*, for defendant and appellant.

WYLY, J. The plaintiff, the administratrix of the succession of Thomas H. Stanton, sues the defendant, Henry S. Buckner, for \$13,000, alleging :

"That said Thomas H. Stanton was a member of the commercial firms of Buckner, Stanton & Newman, of New Orleans, and of Stanton, Buckner & Newman, of Natchez, Mississippi, from the first September, 1859, to the first September, 1861. That said firms were composed of Henry S. Buckner and Samuel B. Newman, who reside in New Orleans, and attended exclusively to the business there, and of said Stanton, who resided and attended exclusively to the business in Natchez.

"That the interest of said Stanton in said firms was one-eighth part of the whole. That he died in September, 1860. That on or about, or after the thirty-first August, 1861, the said Henry S. Buckner and S. B. Newman, the surviving partners of said firms, took possession of all the assets of said firms, treated them as their own, and as the sole proprietors thereof, settled with some of the debtors, gave time to others, used the whole as capital in their business for their own account and profit, and regarded them as so much cash on the thirty-first August, 1861, the day on which the interest of said T. H. Stanton, as a partner, ceased, and to a proportion of which he was entitled, without reference to future liquidation, and therefore they passed to the credit of said T. H. Stanton's 'new account' as a sum due his estate, from the profits

of the business, thirteen thousand dollars, which with interest, now at the rate of eight per centum per annum, from the thirty-first August, 1861, is due to petitioner in her aforesaid capacity of administratrix of the succession of said T. H. Stanton.

"That long subsequent to the death of said T. H. Stanton, the said Henry S. Buckner dissolved his connection in business with said S. B. Newman, and took into his possession as owner all the effects and assets of said firms, including the said balance of thirteen thousand dollars, which was set forth as one of the liabilities of their then firm; and the said Buckner then assumed all the liabilities and responsibilities of the said firms of Buckner, Stanton & Newman, and Stanton, Buckner & Newman, and is liable to petitioner for said sum of money, \* \* \* for which judgment is prayed."

The defendant excepted to the action on the ground that the claim of the plaintiff is one growing out of the unliquidated transactions of the commercial firms of Buckner, Stanton & Newman, of New Orleans, and Stanton, Buckner & Newman, of Natchez, and that the affairs of said commercial firms have never been finally liquidated and closed, but that they are now in process of liquidation and settlement, and that it is not competent for said plaintiff to have and maintain the present action for the specific sum by her claimed in advance of the final settlement and liquidation of the affairs of said partnerships.

Reserving the benefit of this exception, and without in any manner waiving it, the defendant answered; pleading a general denial, and a special denial that he owes the plaintiff any thing, and averring that upon a final settlement of the affairs of the commercial firms aforesaid, the estate of said Thomas H. Stanton will be found indebted to the respondent in a sum far exceeding the amount claimed by the petitioner.

The court referred the exception to the merits, and finally rejecting it, gave judgment for the plaintiff for \$5562 70, the balance found to be due the said Thomas H. Stanton at the dissolution of the partnership on the thirty-first August, 1861.

The defendant appeals, and the plaintiff prays that the judgment be increased to the full amount claimed in the petition.

That Thomas H. Stanton was a partner and owned an interest of one-eighth in the commercial firms of Buckner, Stanton & Newman, of New Orleans, and Stanton, Buckner & Newman, of Natchez, which firm ceased to exist on thirty-first August, 1861, is not disputed. Nor is it disputed that his share of the assets at the dissolution amounted to \$12,991 45. But the defendant contends, and the evidence shows, that this was not cash, but only his part of the profits, consisting of claims believed to be good, belonging to said firms.

It is also shown that at the time of the dissolution said Thomas H. Stanton owed the firms an individual debt of \$7428 75.

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Hilda L. Stanton, Administratrix, v. Buckner.

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After the death of Stanton his partners continued business, taking S. D. Stockman as a partner; and the new firms took charge of all the assets and have been liquidating the affairs of their predecessors.

The legal representative of the deceased has never demanded a partition, nor has she ever taken part in the settlement of the business of said firms. It is shown that over \$300,000 of the assets, believed to be good at the close of the partnership in August, 1861, are now worthless; and that said partnership was then largely involved in debts.

We think the exception of the defendant should be maintained, because there never has been a settlement of the commercial partnership of which the said Thomas H. Stanton was a partner. It is well settled that one partner has no action against another for a specific sum; he must sue for a liquidation of the partnership. 13 An. 576; 21 An. 592; 22 An. 429.

That the defendant "took possession of all the assets of said firms, treated them as his own and as sole proprietor thereof, settled with some debtors, gave time to others, used the whole as capital in business," might be a good cause for damages in the settlement of the partnership, if any resulted therefrom; it is no ground to maintain the present action. That one partner became the *negotiorum gestor* might impose on him the obligation to use due diligence; it would not compel him to insure the validity of the claims he had undertaken to collect; nor would it bind him to pay his associates if he was unable to collect them. *Pratt v. McHatten*, 11 An. 260.

That the defendant received the assets and assumed the liabilities of the firms of Buckner, Newman & Co., and Buckner, Newman & Stockman, in the final settlement with his copartners, does not concern the plaintiff, as the succession of Thomas H. Stanton was not a creditor of said firms for any specific sum. The rights of the latter can only be ascertained by a settlement of the partnership of which the deceased had been a member.

That the surviving partners, on the thirty-first of August, 1861, "passed to said T. H. Stanton's new account, as a sum due his estate from the profits of the business," \$12,991 45, is of no consequence; it does not justify the present suit, because it was only a nominal credit, subject to a future liquidation, entered up in order to balance the books, as is explained by the evidence in the record; and of this the executor of Thomas H. Stanton was duly advised when the statement of the account was rendered.

We find in the record the following letter, dated August 31, 1861, from the surviving partners to the executor of Thomas H. Stanton, viz.:

"As you are aware, the interest of our lamented friend and partner, Thomas H. Stanton, ceases in our business from this date. We have carried to the credit of his estate, new account with our Nathez firm,

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\$12,991 45, which is his full distributive share of all profits for the year ending this date, including a reserve balance which stood over from the former year to credit of profit and loss.

"This transfer is but a nominal credit for the purpose of balancing up our books, and will be paid over as we make collections, subject to *his proportion of bad debts* which may result against us in winding up our business. All our profits are outstanding, besides our half a million of dollars in bills receivable and open accounts of our customers, and we can not account for these profits until we realize them.

"Our late partner had no capital in our business, while both survivors have a large cash capital employed, and are also unable to realize now, which we name to show that all our interests are in the same position."

Newman, a witness of the plaintiff, states that at the dissolution of the partnership "the actual state of Stanton's account was a real debit of \$7428 75, and a nominal credit of \$12991 45." He further explains why Stanton's whole account was not balanced; it was because "he could not balance a real balance against a fictitious credit \* \* \*."

No fraud or bad faith is alleged against the defendant.

There is nothing presented in this case to justify a departure from the well-settled doctrine that one partner has no action for a specific sum against the other; he must sue for a settlement of the partnership.

It is therefore ordered that the judgment appealed from be annulled and that this suit be dismissed at the costs of the plaintiff in both courts.

No. 3783.—F. B. LAMBETH, Widow, et als., v. F. B. DE BELLEVUE, Collector, et als.

Questions in relation to the validity of judgments rendered against a parish, and appropriations made by the police jury to pay them, with other accounts of the receiving and disbursing officers of the parish, can not be inquired into in an injunction suit taken out by a tax-payer against the tax collector of the parish. Nor can the right to the office of tax collector, or any other officer in the parish, be tested in such a proceeding.

**A** PPEAL from the Seventh Judicial District Court, parish of Avoyelles. *Miller, J. Cullom & Walsh*, for plaintiffs and appellants. *A. H. Bordelon and L. J. Ducote*, for defendants and appellees.

WYLY, J. The plaintiffs enjoin the collection of their State and parish taxes, amounting to \$1378 69, alleging that the collector, De Bellevue, is not the duly qualified collector of State and parish taxes; that as to the parish tax, it is "exorbitant, oppressive and illegal;" that it was made to cover sums the parish does not owe; that those who made the appropriation were unauthorized to do so, being usurpers and not legally elected and qualified members of the police jury; that



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they could not stand in judgment as a police jury, and all the judgments rendered against Evariste J. Joffrion and Armand D. Lafargue, as presidents of the police jury of Avoyelles, at different periods, are not and can not be made executory against said parish, because they were not presidents of any legally constituted police jury; that the appropriation allowed is extravagant and unjust, because the account allowed Ducote, sheriff, for his services, is exorbitant, and is without precedent in the history of the parish; that the account of Edwards for printing parish warrants is also unjust, illegal and oppressive, and should not have been allowed; that the entire appropriation of \$10,433 is illegal and oppressive, because the said usurpers had no authority to make it, and because the amount thereof has not been expended for the benefit of the parish; that the amount for which the various judgments have been rendered against the parish should not be collected, because the parish is not liable, "as the forms of law were not observed by the police jury in authorizing the undertaking," in virtue of which the debts were contracted to be paid; that the items of expenditure for which the taxes were assessed were not published according to law; that said judgments against the parish are void, because the usurpers, pretending to be police jurors, did not, when contracting the debts for which the judgments were rendered, provide for the raising of funds to pay said debts; that the subsequent attempt to raise money to pay them is unconstitutional and void, and those who sought to bind the parish by said judgments are without recourse upon said parish; that said judgments are void, and all the appropriations by said illegal and unauthorized persons styling themselves police jurors are null and of no effect.

The prayer of the petition is that the judgments against the parish be annulled, and also the appropriations to pay the same; that the account of Ducote, sheriff, be declared extravagant, unjust and illegal; that the account of Frank and Edwards be also declared unjust, exorbitant and undue; that the commissions allowed the collector be declared exorbitant, and the sum appropriated therefor be disallowed, it having been allowed by individuals who were without authority to bind the parish; that the assessments be declared null; that the office of assessor of the parish of Avoyelles be declared vacant, and that De Bellevue, the tax-collector, be enjoined from collecting the various assessments for State and parish taxes against them, amounting to \$1378 69, and for general relief.

The answer is a general denial.

The court rejected plaintiffs' demand and dissolved the injunction, and they have appealed.

The evidence shows that the tax collector is a legal officer and entitled to collect the taxes.

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F. R. Lambeth, Widow, et als., v. De Bellverre, Collector, et als.

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The title of the members of the police jury to the offices administered by them can not be inquired into in this form of proceeding. That they are bad financiers and have made extravagant appropriations are questions that this court can not determine. As they are to a limited extent a branch of the political department, they necessarily have some discretion in administering parochial affairs. If they have displayed little discretion, and have not administered the business of the parish prudently and economically, it is a misfortune incident to every species of legislation. The courts will not undertake to exercise a supervisory control over these organizations.

It is only when they have violated some special provision of the law, or where they have acted without authority, that the court in a proper proceeding will interfere and correct the evil.

The police jury in the case before us seems to have complied substantially with the law in making the appropriations; and although some of the accounts which it has allowed and proposed to pay may be extravagant, they are, nevertheless, debts due by the parish, and such as the police jury may legally pay.

\* As to the judgments against the parish, they have the force and effect of the thing adjudged, and their validity can not be questioned in this collateral attack. No pretext whatever is set up or shown for enjoining the collection of the State taxes.

Indeed, the whole proceeding shows a palpable desire on the part of the plaintiffs to avoid the payment of taxes. There are several questions argued in the brief which we will not notice, because no issues of the kind are made in the pleadings or stated in the petition as grounds for the injunction. It is shown, however, that the collector added twenty-five per cent. to the amount which he was ordered by the court to collect, in order to pay the several judgments against the parish; and that he added this sum to cover the expense of collecting, which was ten per cent., and also to allow for delinquencies, there being many persons on the tax rolls who would not be able to pay their part of this special tax. It is shown that the police jury has been in the habit of allowing this extra sum to cover delinquencies. It would be impossible for the collector, when making the assessment under the judgments of the court, to know the exact amount to collect from each person, so that when the collection is over there will remain no surplus in his hands. He can not know how many will prove delinquent, and how promptly others will pay, while the interest on the judgments is increasing in the meantime. Under the circumstances we think the collector was not unreasonable in adding the twenty-five per cent. to cover expenses of collecting and the deficiency resulting from the delinquent list. If there shall be any sum remaining from this special assessment to pay the judgments against the parish, of course it must

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be returned to the owners thereof. The collector thinks, after all the collectable tax claims are enforced, there may be a surplus of \$2700 of the fund to pay judgments. If so, the surplus ought to be returned to the several tax-payers, in proportion to the amount overpaid by each. Whether there will be enough without collecting the taxes from the defendants is no ground for them to urge in support of the injunction.

That others have been more honest is no reason for them to refuse to pay taxes.

It is therefore ordered that the judgment herein be affirmed with costs, without prejudice to the defendants to claim any surplus that may be due them out of the special tax, if any shall remain after the collection is completed, and the judgments, interest and costs, and also the costs of collecting the tax, are all paid.

Rehearing refused.

NO. 3621.—WILLIAM A. GLASS v. ALEXANDER WHEELISS.

In this action to recover on a judgment rendered in the city of New York, the defendant set up a reconventional demand, to which the plaintiff urged the plea of *res judicata*, the same defense having been pleaded before the New York court. The evidence offered, and the law of New York in reference to the judgment showed that the reconventional demand set up here was not before the court of New York, and was not passed upon in the rendition of the judgment. Held that if the reconventional demand set up here was not passed upon by the court in New York, it was not *res judicata* there, and could not be so here.

**A**PPPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Wooldridge & Thomas*, for plaintiff and appellee. *Breaux & Fenner*, for defendant and appellant.

HOWELL, J. This suit is brought on a judgment obtained by plaintiff against defendant in the city of New York for the sum of \$4609 82, to be paid in silver coin, and \$141 80 in legal currency. The answer contains a general denial and a reconventional demand for \$1083 75, as compensation for services rendered and expenses paid and incurred in the custody, transportation and recovery of certain specie committed by plaintiff to defendant for safe keeping in Nashville, Tennessee, in February, 1862.

To this reconventional demand the plaintiff opposes the plea of *res judicata*, the same demand having been pleaded as a counter claim in the New York suit. Upon this question the lawyers who represented defendant in said suit testify that at the time thereof the said claim of defendant was not litigated before, submitted to, nor passed on by the court, or any evidence offered in support of or in opposition to the same; the plaintiff having taken an inquest as upon a default, no evidence of any kind being offered by the defendant; that by the Code of

Procedure of New York in such a case the counter claim is not regarded as before the court, and the judgment upon the merits of the plaintiff's demand is not *res judicata* as to the counter claim. If not *res judicata* there, it will not be here. The plea should not therefore prevail.

It is contended, however, on behalf of plaintiff, that the said judgment, construed with reference to the pleadings in said suit, has condemned the defendant as a broker for the amount due on an irregular deposit, and his status as a simple debtor is fixed by the judgment, and he will not be allowed to impeach it and set up a claim for compensation as depositary or mandatory. Admitting the legal proposition here implied or presented, it can not avail, as there is evidence without objection, showing that the coin was delivered in boxes to defendant to be protected from capture by the Federal forces, and that in the effort to do so, he removed it with his own effects to New Orleans, where eventually it was taken possession of by the general commanding, and that in its recovery as well as removal, expenses to the sum of \$586 25 were incurred and actually paid by the defendant. To this sum he is entitled. But to the charge for personal services he is not entitled, no stipulation therefor being proven. R. C. C. 2960, 3022.

It is therefore ordered that so much of the judgment as rejects the reconventional demand of defendant be reversed, and that on said demand there be judgment in favor of defendant against plaintiff for \$586 25 with interest thereon from judicial demand thereof, to be deducted from the sum of \$4609 82 in favor of plaintiff, and that in other respects said judgment be affirmed. Costs of appeal to be paid by plaintiff.

No. 2073.—LEVY & DIETER, in Liquidation, v. DU BOIS, LOWE & FOLEY.

Parol evidence that has been offered by the creditor and received by the judge *a quo* without objection, to prove that a third person has promised to pay his debt, will be disregarded by the Supreme Court in examining the case on appeal.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Roselius & Phillips*, for plaintiffs and appellees. *E. & H. Marr*, for defendants and appellants.

WYLY, J. The plaintiffs allege that the defendants, joint owners of the steamship *Minnetonka* (a vessel engaged in carrying personal property for hire), and commercial partners so far as the transactions of said steamship are concerned, are jointly and severally indebted to them \$20,808 52, the amount of advances made to said vessel by *Alpheus Hardy & Co.*, of Boston, at the instance and for the benefit of the defendants, which said sum the plaintiffs were compelled to pay as sureties

24	396
118	183

24	396
1125	261

of the defendants, who neglected to pay said debt. They prayed judgment against each of the defendants *in solido* for said amount, with legal interest thereon from the twentieth December, 1867, and costs.

The defendant Foley answered separately, pleading a general denial.

He pleads, also, that the Merchants' Towboat Company of New Orleans, a corporation established in accordance with the laws of the State of Louisiana, was the owner, in its aggregate and corporate capacity, of one undivided third of the steamship Minnetonka, of which the other two-thirds were owned by Lowe and Du Bois.

That the stock of the Merchants' Towboat Company was divided into sixty shares, of \$500 each, of which respondents' firm, Thomas & Foley, owned originally twenty-two shares; and plaintiffs, Levy & Dieter, owned fifteen shares; the other shares being owned by other parties, all living in New Orleans, whose names and the number of shares held by them respectively are set out in detail.

That after the date of the act of incorporation, Thomas & Foley sold seven of the twenty-two shares originally owned by them, and thenceforth said firm owned fifteen shares, the same number as held and owned by Levy & Dieter; and this was the condition and ownership of the stock at the date at which the Company became the owner of the one-third of the Minnetonka.

That when it became necessary to register the vessel at the Customhouse at New Orleans, respondent, whose firm of Thomas & Foley were managers of the Merchants' Towboat Company, desired to have the registry made in the names of Lowe and Du Bois and the Merchants' Towboat Company; but for convenience, and after the matter had been canvassed and was well understood at the Customhouse, the registry was made in the names of Lowe and DuBois and respondent, respondent representing and acting for the company, all of which was well known to and understood by the stockholders and by Levy & Dieter specially.

That Levy & Dieter have sold the Minnetonka and received the price, and have also collected and received all the earnings of the vessel, for no part of which have they accounted to the Merchants' Towboat Company. That respondent has no knowledge whatever of the account upon which the present action is brought, nor of the state of accounts between Levy & Dieter and the owners of the Minnetonka. But he alleges that Levy & Dieter can in no event claim of him individually, nor is he liable in any manner whatever to Levy & Dieter *in solido*, for any claim or demand which they may have or pretend to have against the steamship Minnetonka or her owners.

The court gave judgment against the defendants *in solido* for the amount claimed, and the defendant Foley has appealed.

Our attention is directed to two bills of exceptions taken by the defendant, Foley, to the ruling of the court in rejecting a certified copy of the notarial act of incorporation of the Merchants' Towboat Company, and certain parol testimony offered by him to prove that one-third of the steamship Minnetonka belonged to the Merchants' Towboat Company; that Levy & Dieter were stockholders, holding as many shares of stock of said company as Thomas & Foley; that Thomas & Foley were managers of said company; that the registry of the Minnetonka at the Customhouse, in the name of Foley for one-third of said vessel, was for the Merchants' Towboat Company, and it was so registered for convenience by him as manager; and that the liability of the defendant Foley toward plaintiffs was only such as results legally from the fact that the firm of Thomas & Foley were stockholders and managers of said Merchants' Towboat Company.

The court refused this evidence for the reason that the plaintiffs sue as subrogees of Alpheus Hardy & Co., claiming all their rights; that as to Alpheus Hardy & Co., the defendant, Foley, having registered the vessel in his own name, could not deny the fact. He held himself out to the world as one-third owner, and Alpheus Hardy & Co. acted upon the information contained in the registry. That testimony diminishing the liability of the defendant Foley, which would not be admissible against Alpheus Hardy & Co., can not be admissible against the plaintiffs asserting the rights of Alpheus Hardy & Co., to which they claim to be subrogated by operation of law.

We think the court did not err in rejecting the evidence.

In advancing to the vessel, Alpheus Hardy & Co. gave credit to the owners; they had the right to presume that Foley was the owner of one-third, because he appeared as such in the registry at the Customhouse; besides, they held his power of attorney authorizing them to sell his undivided third of said vessel.

If the allegation of the plaintiffs be true, that they were the sureties of the defendants and were compelled to pay the debt due by the latter to Alpheus Hardy & Co., they ought to receive the amount owing by the defendants, and which they were compelled to pay.

From the evidence, we are satisfied that defendants were liable *in solido* on the twentieth of December, 1867, to Alpheus Hardy & Co. for \$20,656 85, for advances to the steamer Minnetonka, a common carrier; and that the defendant, Foley, having held himself out to them as part owner, was liable as owner.

A fair interpretation of the evidence of Alpheus Hardy, Joshua W. Davis and A. D. Dieter, which was received without objection, leaves no doubt that the plaintiffs were bound to Alpheus Hardy & Co. as the sureties of the defendants. Having advanced a large amount, for which they held a bottomry bond on said vessel, signed by the defend-

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ant, Foley, as part owner, they consigned it to Alpheus Hardy & Co., and we are satisfied they guaranteed the payment of such advances as Alpheus Hardy & Co. might make in behalf of the owners.

There is no doubt that the owners were advised of the advances made by Alpheus Hardy & Co., and that they assented thereto.

As to the objection that, under the act of 1858, parol evidence shall not be received to prove any promise to pay the debt of a third person, we will remark that if this statute were applicable to this case, the parol evidence was received without objection, and we will give it effect.

We are satisfied that the plaintiffs, paying the debt due Alpheus Hardy & Co., as sureties of the defendants, became thereby subrogated to the rights of the former against the latter, and that they are entitled to judgment for \$20,656 85, with five per cent per annum interest thereon from the twentieth of December, 1867.

This amount is proved to have been paid. The plea of usury was not set up in the answer, although it is urged in the brief.

The other defenses, set up only in the brief of the appellant, we will not notice.

It is therefore ordered that the judgment herein as to the defendant Z. Foley be reduced to \$20,656 85, and as thus amended that it be affirmed.

It is further ordered that the plaintiffs pay costs of this appeal.

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ON REHEARING.

Howe, J. In the case of *Merz v. Labuzan*, 23 An. 747, we had occasion to decide that the law of 1858, which declares that parol evidence shall not be received to prove any promise to pay the debt of a third person (R. S. 1870, s. 1443) must prohibit the court from giving any effect to such evidence, even if received without objection.

The plaintiffs in this case alleged that Alpheus Hardy & Co. made advances and furnished supplies to the vessel of defendants, but were unwilling to do so, except upon the previous agreement of plaintiffs to be securities for the reimbursement of the same; that they became, such securities, and as such were obliged to pay the debt, and having paid it, they claim to have been legally subrogated and to have a right to recover it from defendants.

There is no written evidence in the record to prove this promise by the plaintiffs, and therefore nothing to support the allegation that they were bound to pay the debt, and being bound, were by the fact of payment legally subrogated. And see also *Graves v. Scott*, 23 An. 690.

We think that justice requires the cause to be remanded; and we

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will take occasion to say that we do not think the appellant, Foley, can be held in any event for premiums of insurance not specially authorized to be paid for his account.

It is ordered that the judgment heretofore rendered by us be set aside. It is now ordered that the judgment of the lower court be reversed and the cause remanded for a new trial, appellees to pay costs of appeal.

No. 3658.—SUCCESSION OF MARIE E. BERNARD, Widow of ANDRE LE BLANC.

The parish court is without jurisdiction, *ratione materiz*, to pass upon a claim against an estate for supplies furnished, where the amount claimed is above five hundred dollars. A document required to be stamped with an internal revenue stamp is not admissible in evidence if it has not the amount of stamps upon it at the time it is offered. In such a case the judge is prohibited, by the act of Congress of 1865, from allowing the stamps to be placed upon it; but the revenue collector of the district may cause it to be stamped, provided the penalty of fifty dollars is paid, which the law imposes in such cases.

**A**PPEAL from the Parish Court of Lafourche. *Josh Nicolas*, Parish Judge. *A. F. and Clay Knobloch*, for opponent and appellant; *E. W. Blake* and *Louis Bush*, for the succession.

LUDELING, C. J. Marie E. Bernard died in the year 1868, leaving three heirs, viz: Mrs. Modeste Aubert, Miles T. Bernard and Mrs. J. T. Ledet. On the third of December, 1870, the administratrix filed a final account and a proposed distribution or partition of the funds among the heirs. Oppositions were filed by heirs and creditors.

We think the several sums, which it is contended should be collected by the heirs, were not donations, but *dations en paiement*, made by their mother on account of the succession of their father. But, whether donations or not, it would seem that like amounts were given to each of the heirs.

The claim of Mrs. Ledet against the succession for moneys and supplies furnished and services rendered to the deceased, amounting to \$1270, being disputed by the succession, the parish court had no jurisdiction, *ratione materiz*, to act on the claim, and the plea to the jurisdiction should have been maintained.

The share of M. T. Bernard is claimed by Mrs. Aubert, under a private act, not recorded and unstamped at the time it was offered in evidence. The same interest is claimed by Xavier Meyer, who had it seized and sold under an execution against M. T. Bernard, subsequent to the transfer made to Mrs. Aubert. Xavier Meyer opposes the account, and proposed distribution of the funds, on the ground, among others, that the share of M. T. Bernard thereto should be paid to him.

When the unstamped private act was offered in evidence, it was objected to, on the ground that it was utterly null and void, being



unstamped. The court *a quo* permitted the attorney to place a stamp upon the document, in the presence of the court, and then admitted it in evidence.

We think the judge *a quo* erred in permitting the stamp to be affixed, and in receiving the document in evidence. The act was dated eleventh of May, 1868. The act of Congress, dated thirtieth of June, 1864, declares that "no deed, instrument, document, writing or paper, required by law to be stamped, *which has been heretofore signed or issued* without being duly stamped, or with a deficient stamp, nor any copy thereof, shall be recorded or admitted or used as evidence in any court, until a legal stamp or stamps, denoting the amount of duty, shall have been affixed thereto, etc.; \* \* \* and the person desiring to use or record any such deed, instrument, document, writing or paper, as evidence, his agent or attorney is authorized, in the presence of the court, etc., to affix the stamp," etc. Brightly's Dig. 265, s. 257.

This section of the act of 1864 only applies to instruments made or executed before the thirtieth of June, 1864, and therefore could not apply to the act in question, which is dated eleventh of May, 1868. The provisions of the act of 1865, s. 1, declare that each "instrument or paper, bill, draft, order or note, shall be deemed invalid and of no effect;" \* \* \* provided that the party having an interest in the same may have the stamp affixed by applying to a collector of the revenue and paying the penalty of fifty dollars and the necessary stamp duty, with six per cent. per annum interest thereon from the date of the instrument; and then the instrument shall be deemed valid as if originally stamped. This the party offering the act has failed to do; and we think the creditor had a right to seize and sell his interest in the succession, inasmuch as the private act had no legal effect until the stamps were affixed according to law.

Besides this, the act specifies no price or consideration. It states only "for value received." And further, Mrs. Aubert is estopped from attacking the sheriff's sale, as she assented to the same by her silence and acquiescence, when she should have asserted her rights if she had any. The notice of the seizure of the interest of M. T. Bernard was served upon her, as administratrix of the succession of Mrs. Bernard, and she took no steps to stop the sale or to notify the sheriff or purchasers that she owned said interest.

The judgment of the lower court seems to have done substantial justice between the parties.

It is therefore ordered and adjudged that the judgment be affirmed, and that the appellants pay the costs of appeal.

#### ON REHEARING.

TALIAFERRO, J. A review of the case does not induce us to change

the decree already pronounced. The principal point urged in the application for the rehearing is, that there are errors of calculation to the prejudice of Mrs. Ledet, in the estimate forming the basis of the judgment in the court below amending and approving the account of the administratrix. We think the opponent has not shown that there are such errors of calculation.

It is therefore ordered that the judgment rendered by this court remain undisturbed.

No. 2756.—HENRY PEYCHAUD, Commissioner, v. EVERETT LANE.

The general denial admits the capacity of the plaintiff. A stockholder in an insurance company can not be heard to urge as a defense to a suit brought against him on his stock note, by the creditors through their representative that the charter has been illegally changed, because no act on the part of the stockholders can defeat the rights of the creditors of the corporation.

**A** PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. A. & P. Robert*, for plaintiff and appellee. *Lacey & Butler*, for defendant and appellant.

**WYLY, J.** The defendant appeals from the judgment for \$750, being twenty per cent. on his stock note obtained against him by the plaintiff as commissioner appointed to liquidate the affairs of the corporation known as the Great Southern and Western Life Accident, Marine and Fire Insurance Company, the defendant being a subscriber for fifty shares of its stock.

The defense is the general denial, and the averment that since the defendant became a subscriber to the capital stock of the Great Southern and Western Life and Accident Insurance Company, *and without his knowledge and consent*, the charter of said company had been illegally altered and amended; that the property and assets of the company had been improperly disposed of, and that by these and other unlawful acts of the company he had been forever released and discharged from all liability on the note aforesaid, and as a stockholder of the company.

Defendant also filed a supplemental answer, and therein set up for further special defense that the stockholders' meeting, held on the eighteenth May, 1866 (at which it is pretended that the charter of the Great Southern and Western Life and Accident Insurance Company was amended), was absolutely null and void, for the following reasons, to wit: no notice of such meeting was given to the stockholders. If notice was given, it failed to set forth the object of the meeting; the notice was not served personally or at domicile, in accordance with law; a reasonable time was not given, nor was a majority of the stockholders present; the votes cast at the meeting by proxy were null and

void, and the meeting illegal and without effect, because the law did not authorize a proxy to vote for an amendment of the charter, and no authority was ever given to said proxies by any special power of attorney or otherwise; and furthermore, and finally, that the number of votes required to effect a valid change of the original charter was not given.

The general denial admits the capacity of the plaintiff. That the defendant owes the corporation the stock note, upon which the contribution of twenty per cent. is demanded to pay debts, is not disputed; besides this, the note is in evidence. No act or contract on the part of the stockholders can defeat the rights of the creditors of the corporation, who are represented by the plaintiff in his fiduciary capacity. So far as the creditors are concerned, it is not in the power of the stockholders to liberate any one of their number from his obligation to pay the full price of the shares subscribed for by him. 10 Rob. 440.

So far as the irregularity of the amendments to the charter are concerned, we will remark that if such a defense could be entertained in the present action, it would not benefit the defendant; because in a notarial act he formally ratified and approved of the last amendment, and if any objection be had to the prior amendment it should then have been urged. We agree with the learned judge *a quo* that this ratification of the last amendment amounted to a tacit recognition of the one preceding it.

This case is like the one presented by the same plaintiff against J. B. Hood, lately decided, where the latter was condemned to pay the amount demanded.

There is no force in the other objections set up by the defendant.

Judgment affirmed.

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**No. 2762.—CITY OF NEW ORLEANS v. ROBERT P. SMITH AND THOMAS L. MAXWELL, Sheriff.**

A judgment creditor who accepts a warrant on the treasury of the city of New Orleans, which, when paid, is to operate an extinguishment of the judgment, must return, or offer to return, the warrant before he can proceed further in its execution. If the judgment creditor has failed to return the warrant, but has attempted to collect it, then and in such case an injunction will lawfully issue, restraining the execution of the judgment.

**A**PPPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Geo. S. Lacey*, City Attorney, for appellee; *Alexander Walker* and *James Lingan*, for defendant and appellant.

**WYLY, J.** This is an injunction sued out by the plaintiff to restrain the execution of the writ issued by the defendant, Robert P. Smith, to enforce the collection of a balance of \$1416 57 alleged to be due on a judgment which he recovered against the city of New Orleans. The ground for the injunction is, a warrant has been given to the defendant

for this balance, which novated the debt, and if the warrant has not been paid, the defendant has not returned nor offered to return it to the plaintiff.

The court perpetuated the injunction, and the defendant appeals.

Novation being never presumed, it can not be implied, from the fact that the city gave her judgment creditor a check or warrant for the balance due on the judgment. It appears, however, that when payment of the warrant was refused by the treasurer, the defendant never returned or offered to return it to the city.

On the contrary, it is shown that he transferred it to one Charles W. Frost, who sued out upon it and other warrants a mandamus in the Sixth District Court against Mount, treasurer, and obtained judgment in his favor, making the mandamus peremptory. Having thus disposed of the warrant, the defendant has no right to execute the judgment for the satisfaction of which it was given.

In order to exercise his rights resulting from the judgment, he must return or offer to return the check or warrant given in satisfaction thereof.

He will not be permitted to transfer the warrant, and after judgment has been rendered thereon against the city in favor of Frost, to proceed to the execution of the judgment, in satisfaction of which the warrant was given to him.

In addition, we will remark that, since the appeal has been taken, the Legislature has passed a law prohibiting the issuance of the writ of *fi. fa.* against the city, providing another mode of satisfying judgments against it. Act seventeenth of March, 1870. *City v. George* Ruleff, 23 An. 708.

Judgment affirmed.

#### NO. 2415.—D. W. McCranke et als. v. M. N. Wood.

In this cause the evidence shows that defendant made a contract with plaintiffs, all residing within the rebel lines of military occupation during the late war, whereby he was, with his steamboat, to transport their cotton from the different plantations where it was then lying, to such other place as the defendant might deem safe from the casualties of the war, for which he was to have one-fourth of all the cotton saved. Defendant performed his part of the contract by transporting large quantities of cotton to other points then deemed safe. But in the progress of the war the cotton thus removed to its new locality fell directly within the lines of active military operations, and was either stolen or destroyed by fire. The owners now bring suit against Wood, the contractor to remove it, either for the cotton or its value.

Held, that it being shown that Wood had performed his part of the contract as far as it was in his power; that the cotton was destroyed or stolen by an overpowering force in time of war, which he was unable to resist, he was not legally liable for the cotton, nor its value.

**A** PPEAL from the Fourth District Court, parish of Orleans. *Theard, J. Edward Phillips*, for plaintiff and appellant. *Clarke & Bayne*, for defendant and appellee.

WYLY, J. The plaintiffs allege that in May, 1862, they shipped on

the steamboat Red Chief, of which the defendant, Wood, was master and owner, one hundred and six bales of cotton, which the said Wood agreed to deliver at the port of New Orleans, "or such other port as the said shippers might think, as soon as the war which was then raging should terminate, until which time he was to take care of and keep said cotton safely, for which service he was to retain one-fourth of said cotton;" that said cotton was taken by said Wood on board of said boat in the Atchafalaya river and carried away by him, and he has failed to return the same at the port of New Orleans, as they have requested him to do, or to account for the same in any way; that he has fraudulently disposed of it for his own benefit and advantage; and that the value of said cotton at the time it should have been delivered was \$250 per bale.

The prayer of the petition is for judgment against the defendant for \$19,875 and interest.

The defendant pleads the general denial, admits that he was master of the steamboat Red Chief at the time said cotton was taken on board, but avers that it was exposed to imminent danger of loss and destruction by burning, which was then extensively carried on in that region by parties acting, or pretending to act, under the authority of the so-called Confederate government; that plaintiffs and others desired this respondent to receive their cotton on board said steamer, and to convey it to such place or places of safety as in his judgment might be found, agreeing to give him one-fourth of said cotton that might be saved; that he did, to the knowledge, request and satisfaction of said plaintiffs, carry the same to Cow Island, in Bayou Flagon, a secluded place, and there store the same according to his best ability; that he exercised all the care and diligence of which he was capable in preserving the same; that it was taken by overpowering force, and either run off or destroyed.

The respondent specially denied that he ever used or converted a single pound of said cotton, and he avers that the charge is maliciously made against him by the plaintiffs.

The court rejected the plaintiffs' demand, and they have appealed. We think the evidence fully sustains the defense.

The plaintiffs were anxious to save their cotton from being burned; they gave it to the defendant to be conveyed to such place of safety as he might find, and there to be kept till the war terminated, and then to be brought to New Orleans, he receiving one-fourth thereof for his services.

Owing to the condition of the country in 1864, we think the defendant could not have prevented the parties who got the cotton from taking it.

The place where it was stored was at the time probably as safe as

any other—at least the defendant thought so. It is proved that he never converted or appropriated the property, and that all the cotton in that region was burned or stolen during the war.

The defendant, who was examined as a witness, states: "I was captain of the *Red Chief* in May, 1862; was in the *Atchafalaya* with the *Red Chief* at the time when Bennet B. Simmes came to me and proposed to give me a load of cotton to take to some secure place wherever I chose, and to keep it until the close of the war, and then (if saved) to be delivered to merchants as per bill of lading. I received from various parties five hundred and ninety-four bales upon the same terms. I was to receive one-fourth of the cotton, if I saved it and succeeded in getting to New Orleans with it, there to be delivered to different consignees. I carried the cotton into Catahoula parish, on an island in Catahoula Lake, named Cow Island, on Bayou Flagon, which empties into the lake. This was as secure a place as I knew of in the State, and the cotton would have been kept safe had it not been stolen.

"I employed a man to look after it as long as the state of the country would permit. His name was Wilson, and he wrote to me occasionally concerning it. I went once to see it with the steamboat, with the intention of removing it, but after getting there and seeing the condition of things, I changed my notion; because Cow Island was a secure place, and the bagging being loose, the cotton might have been destroyed in removal. At the time I took this cotton on board, cotton was being burned in the neighborhood. I had three hundred bales of cotton on Little River about twenty miles below Cow Island. This cotton was my own property, and was burned by order of General Walker of the Confederate forces. I had other lots above, on Little River, all being my individual property; one of these lots was burned and the other two were stolen.

"I carried a great deal of cotton up Little River for other parties, none of which was saved, so far as I know.

"Very little cotton on Little River was burned; most of it was stolen about the time of General Banks's raid.

"The cotton in controversy was stolen about the time of this raid, as no one could get into the country, and if I had had a thousand men they could not have protected this cotton; there was a great deal of burning and stealing at this time. It was unsafe to travel through the country; jayhawkers and thieves abounded. I have never sold nor taken away, nor received a pound of this Cow Island cotton. I exercised all the care in my power for its protection. \* \* \* I was asked to take the cotton on board the *Red Chief* to save it from destruction. A portion of the load was to have been burned the next day—a portion having been hauled out for that purpose."

Judge Merrick was also examined as a witness. He states: "That

he was on the Atchafalaya at his plantation, in April and May, 1862. Knows that there was great anxiety on the part of the cotton planters relative to the burning of their cotton, as Captain Brown, in that beat, and Captain ———, in the adjoining beat, said they had instructions to burn cotton. Witness conferred with Brown to induce him to defer burning cotton, and planters were very anxious to get their cotton removed by steamboats to some safe place. Witness saw the Red Chief lying in the Atchafalaya; thinks he saw her when she came up from General B. B. Simmes'. Witness sent off some cotton, say twenty-six bales, by the Red Chief the same trip. It was to be taken up Little River by Captain Wood, and he was to take it to some place which he considered safe, and to be kept till the close of the war, when he was to bring it to New Orleans for sale; and he was to have one-fourth for his trouble in taking it to a place of safety and bringing it to New Orleans after the war. I understood he was to take my cotton on the same terms he took the cotton for the other parties. \* \* \* My understanding, however, was that my cotton was to be taken on the same terms as that engaged by General Simmes for, I think, McRea and others; this I feel quite sure of. My understanding was that Captain Wood was to take the cotton to some place which he thought safe, and take reasonable care of it. I did not suppose him responsible for casualties, and I have made no demand on him for payment. A great deal of cotton was burned in the adjoining beat about this time, or a little later, and some in this beat."

After fully examining the evidence, we have concluded that the facts stated by these two witnesses disclose the true state of the case. The country was in a state of war, and the port of New Orleans was occupied by the national forces at the time the contract was made between the plaintiffs and the defendant in relation to the cotton, which was in rebel lines. The services of the defendant and his boat were employed in the desperate effort to avoid the loss and to save, if possible, the cotton from the casualties of the war—the defendant, by the contract, being made a partner to the extent of one-fourth of what he might save.

From the evidence we are satisfied he acted in good faith, and did for the plaintiffs the best he could under the circumstances, it being no part of his contract to insure against the casualties of the war. As all the cotton in that region of country was destroyed or stolen; as lawlessness and violence prevailed, we believe it was impossible for the defendant to save the cotton in which he was interested as a partner to the extent of one-fourth; and therefore conclude it will be against law and good conscience to condemn him to pay what is demanded by the plaintiffs.

The principles of the law of common carriers is not applicable to a case like this.

Judgment affirmed.

State v. Board of State Assessors, Jack Wharton and others. State ex rel. George et als. v. Graham, Auditor. State ex rel. Jack Wharton v. Graham, Auditor.

**No. 4016.—STATE OF LOUISIANA, through S. BELDEN, Attorney General, on the information of WM. GEORGE v. BOARD OF STATE ASSESSORS, JACK WHARTON and others. STATE OF LOUISIANA ex rel. WM. GEORGE et als. v. JAMES GRAHAM, Auditor. STATE ex rel. JACK WHARTON v. JAMES GRAHAM, Auditor. (Consolidated.)**

The commission of a tax collector who has not been confirmed by the Senate within the time prescribed, expires on the third Monday after the meeting of the next General Assembly, and the office becomes vacant, and such person so appointed, but who has not been confirmed, can not thereafter maintain a suit under the Intrusion act against another person who has been appointed by the Governor to fill the the vacancy. Nor can such person whose office has become vacant by the non-action of the Senate maintain a mandamus against the Auditor of Public Accounts to compel him to warrant in favor of such defunct officer for an advance allowed by law to the Assessor, because the office which he holds is vacant as to him, and he has no right to the advance allowed the lawful officer.

**A** PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. E. Filleul and J. B. Howard*, for relators. *S. Belden*, Attorney General, for respondent.

WYLY, J. The first case is a proceeding under the intrusion act to have Jack Wharton, J. W. Swords, H. Harris, B. P. Blanchard, J. W. Fairfax and C. W. Ringgold declared usurpers and intruders into the offices they occupy, to wit: the offices of State Assessors for the city of New Orleans, and to have Wm. George and the other persons named in the petition declared lawfully entitled to said offices. The court rejected the demand and decided that the respondents were entitled to the offices in dispute. It appears that Wm. George and his associates were appointed State Assessors in March, 1871, for a term expiring on the first of January, 1873, according to section 10, act No. 42 of the session of 1871—the Legislature not being in session at the time of said appointments.

It also appears that the succeeding session of the General Assembly, the session of 1872, adjourned without confirming said appointments.

Article 61 of the constitution provides that: "The Governor shall have power to fill all vacancies that may happen during the recess of the Senate by granting commissions, which shall expire at the end of the next session thereof, unless otherwise provided for in this constitution; but no person who has been nominated for office and rejected by the Senate, shall be appointed to the same office during the recess of the Senate." "Whenever a vacancy occurs in any office, State parish or municipal, in this State, now existing or which may hereafter be created, from death, resignation, or from any other cause whatever, the mode of filling which is not provided for in the constitution, all such vacancies shall be filled, if they be State or parish offices, by appointment by the Governor, with the advice and consent of the Senate, which appointment shall be for the entire unexpired term of



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such vacant office. If the Senate be not in session at the time the appointment is made, the vacancy shall be filled by appointment by the Governor, which appointment shall expire on the third Monday after the meeting of the next session of the General Assembly thereafter, unless the time for which the vacancy exists expires sooner; and if the time of such vacancy has not expired, it shall then be the duty of the Governor to fill such unexpired vacancy by appointment, by and with the advice and consent of the Senate; and if it be a municipal office, the vacancy must be filled by appointment by the Governor for the unexpired term of the person whose office is so vacated." Revised Statutes of 1870, section 2606.

The office in dispute was not created by the constitution. The section of the Revised Statutes of 1870, just quoted, must, therefore, determine the duration of an appointment to a State or parish office made by the Governor during the recess of the Senate. In express terms the law provides that such "appointment shall expire on the third Monday after the meeting of the next session of the General Assembly thereafter."

Before the first day of February, 1872, the third Monday of the next General Assembly had passed; consequently, the appointments of Wm. George and the other persons named in the petition expired. The Governor had the right to fill the vacancies in these offices by the appointment of Jack Wharton and the other respondents in March, 1872.

These respondents are not intruders and usurpers as alleged in the petition.

Whatever right Wm. George and the other persons named in the petition had to these offices ceased with the expiration of their appointments, on the third Monday of the session of the General Assembly of 1872. The judgment in this case is therefore affirmed.

The second case is a proceeding by mandamus to compel the Auditor to issue to Wm. George, H. Heidenhain, J. Mansion, H. L. Rey and J. J. Gutierrez, each a warrant for \$1000, pursuant to the forty-ninth section of act No. 42 of the acts of 1871, these relators alleging that said amount was, on the first of April, 1872, due them as State Assessors for the city of New Orleans, by the provisions of said act.

The statute relied on does not support the demand of the relators. It allows an advance on the salary of each of the Assessors of \$1000 on the first day of April, and also a like advance on the first day of July of each year, to be credited on the final settlement of their accounts for the assessment of that year. It is not pretended that the relators have undertaken the assessment of the city of New Orleans for the year 1872; and we have just shown that their appointments expired and their successors were appointed before the first of April, 1872.

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Why they have seen fit to claim the advance provided by law for the assessment of 1872, under the circumstances stated, we can not imagine. Not having made the assessment of 1872, and not being authorized to make it by reason of the expiration of their appointments, the relators are wholly without right to collect any part of the salary therefor. To contend that they are entitled to the advance allowed by section 49 of act No. 42 of the acts of 1871, on an assessment which they have not attempted to make, and which they were wholly unauthorized to make, is simply absurd.

The judgment dismissing the demand of the relators is therefore affirmed.

The third case is a mandamus sued out by Jack Wharton, State Assessor for the city of New Orleans, to compel the Auditor to issue to him his warrant for \$1000, an advance on the assessment of 1872, pursuant to section 49 of act No. 42 of the acts of 1871.

The court made the mandamus peremptory, and we think the judgment is correct. We have seen that the relator, Wharton, was legally appointed State Assessor for the city of New Orleans in March, 1872. As such, he is charged with assisting in making the assessment of 1872. The plain provision of section 49 of act No. 42 of the acts of 1871, on which his proceeding is based, allowed the relator an advance on his salary on the first of April, 1872, of \$1000.

The court did not err in rendering the mandamus peremptory. The judgment is therefore affirmed.

#### NO. 3690—THOMAS MCKNIGHT v. THE CITY OF NEW ORLEANS.

The city of New Orleans having acquired the Waterworks by purchase from the Merchants' Bank, under a provision of the charter of the bank, has now full control of the hydrants in the streets; and as she has full control of the streets as public highways, she may manage the distribution and disposition of the water that flows through the hydrants and thoroughfares in such a way as to be of the greatest advantage to the inhabitants of the city.

A person who has heretofore had the exclusive privilege from the city of using water from the hydrants for the purpose of sprinkling the streets, can not complain if this privilege has been (in a regular way) taken from him and given to another who paid more for the water than he had paid, because it is within the power of the city, through her administrators, to withhold altogether, and from all persons, the use of water from the hydrants for the purposes of street sprinkling. An action in damages will not, therefore, lie in favor of such person who has lost the occupation of street sprinkling by the city conferring it upon another.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Richard Shackelford*, for plaintiff and appellee. *George S. Lacey*, City Attorney, for defendant and appellant.

This case was tried by a jury in the court below.

*Howe, J.* In the year 1869, the plaintiff being the highest bidder, obtained from the waterworks of New Orleans the exclusive privilege

of using water from the hydrants in the streets for the purpose of street sprinkling, for which he paid the sum of nine hundred dollars; and in the same year he enjoined one Casserly from infringing this exclusive privilege.

In 1870 he was again the highest bidder, and again received and and enjoyed the same exclusive right.

In 1871, the city having become owner of the waterworks, the plaintiff was again a bidder, but not the highest one, and the privilege was awarded to Joseph Elliott for the sum of two thousand dollars.

The plaintiff at this point seems to have changed his views in regard to the legal propriety of such an exclusive privilege. He applied to the city for a supply of water to be used in the business of street sprinkling, but was refused, on the ground that the right had already been granted for one year to Elliott, a higher bidder. He thereupon commenced this action, alleging that his business of sprinkling streets, for which he was compensated by subscriptions of individual owners of property, had been broken up by this unlawful refusal, and claimed damages in twenty thousand dollars.

The cause was tried by a jury, who rendered a verdict in favor of plaintiff for the sum of five thousand dollars, and from a judgment rendered thereon the defendant has appealed.

At a first glance at the evidence in the case it might be a matter of grave doubt whether the plaintiff has sustained any such damages as can form a basis for a judgment against the city. It appears that he sold his carts at "what he asked for them," and it would not be a violent presumption to suppose that he found a ready market for his mules in the spring of the year. At least it does not appear that they were sacrificed. He then went into business as a merchant, and, perhaps, he was a gainer by the change of pursuits. The verdict seems to be composed entirely of speculative profits which, he thinks, he would have realized if he had continued the business of drawing water from the hydrants of the city and sprinkling it about the streets, and had been successful in such business.

We prefer, however, passing this point to inquire at once whether the acts of the city in the premises were of that unlawful character which would bring the corporation within that broad rule of law which declares that every act of man which causes damage to another, obliges him by whose fault it has been committed to repair the damage resulting therefrom. Was the city legally in fault?

By section thirty-eight of the act incorporating the Commercial Bank of New Orleans, it was provided that "the corporation of New Orleans shall be supplied by the said company, free of charge, with all water necessary for the extinguishment of fires and other public purposes, nor shall the City Council be subjected to any charge of water

furnished to supply the gutters of the said city and faubourgs; and that the said company, as they progress in laying aqueducts, shall place, free of any charge whatever, two hydrants of a proper construction, in front of each square, at a suitable distance from each other, from which a sufficient quantity of water may be conveniently drawn, for extinguishing fires, for wetting, washing and watering the streets and gutters, and any other public purposes; that, on the squares which do not front the river, the hydrants shall be placed on opposite sides of the streets, at an equal distance from each other, and the corners; that the said hydrants shall be of a proper size, and made so as at all times to furnish water for the fire engines, and purposes herein mentioned; it shall further be the duty of said company to supply water for all the purposes herein mentioned, at all times during the continuance of this charter, unless prevented by some unavoidable accident; and in case such shall occur, the repairs shall be made and the water again furnished, at the expiration of the necessary delay; and the said company shall supply a sufficient quantity of clear, pure and wholesome water for the use of the inhabitants within the limits aforesaid, at the elevation of fifteen feet, when the same may be required; provided, however, that said hydrants shall be under the control of the Commercial Bank."

Under the provisions of law the city became the owner, by purchase, of the waterworks prior to the events which gave rise to this action. So far, then, as any obligation of the bank to the city was concerned, it might perhaps be said that the latter became by this transfer at once debtor and creditor, and the obligation was extinguished by confusion.

"L'extinction qui en résulte est commune à toute espèce d'obligations. \* \* Les expressions de débiteur et de créancier employées par notre article ont un sens très étendu qui embrasse tous les engagements de quelque nature qu'ils soient. \* \* Larombière on art. 1300, C. N. No. 16.

But the plaintiff insists that there was a legal obligation on the part of the bank, and so on the part of the city, as transferee, to supply *him* with water for use by him in his business. We are unable to perceive this. The duty of supplying water for watering the streets was imposed on the bank in favor of the city, and, even if it still exist, is a matter in which the plaintiff has no special legal interest. The duty of supplying water to the individual inhabitant is evidently for domestic and other purposes upon private premises. A sufficient quantity of *clear, pure and wholesome water*, for the use of the inhabitants, is to be supplied, *at an elevation of fifteen feet*. The relation of this obligation to the business of street sprinkling is not perceived.

The city of New Orleans owns the waterworks; she has full control, especially, of the hydrants in the streets; she has full control of the

streets as public highways. Her administrators have a large discretion in the management of her property and the police of her thoroughfares. The water that flows through her hydrants is pumped up from the river at great cost, and it is matter of public notoriety that the supply for more important purposes than laying dust is frequently inadequate. She might declare that it was better that her citizens should suffer from dust than from conflagration, and decline to furnish any water for street sprinkling; she might, probably, prohibit the business of street sprinkling as a private pursuit, which she now merely tolerates, if it seemed, as it might, to be an interruption to the free use of the thoroughfare; and we see no good reason why, in the exercise of a similar discretion—which the judiciary should be careful not to question or infringe—she may not lawfully dispose of the privilege of drawing water for sprinkling streets to the highest bidder, and thus *pro tanto* lighten the burden of the tax-payer.

In the recent case of the Eclipse Towboat Company v. the Pontchartrain Railroad Company, 24 An., p. 1, we had occasion to decide that when a railroad was under no legal obligation to "pro rate" through freight with any one, a refusal to pro rate with the plaintiffs was not illegal, nor did it become illegal, because the railroad had made an arrangement upon sufficient consideration to pro rate with some one else. This case seems to be one in point.

It is therefore ordered that the judgment appealed from be reversed and the verdict set aside, and that there be judgment in favor of defendants, with costs in both courts.

WYLY, J., *dissenting*. The plaintiff alleges that he has been engaged for several years in the business or occupation of sprinkling the streets of New Orleans; that in conducting it he has been compelled to keep a large number of mules, carts, drivers and stables, in which he has a large capital invested; that the city of New Orleans has heretofore furnished him the necessary water for said business from the waterworks; that he would not have engaged in, nor invested his capital in, said business except for the facilities afforded by said waterworks, and the inducements held out by the habit of furnishing water for that purpose; that the city of New Orleans furnished him water for said business during the whole of the year 1870, for which he paid punctually; that he applied for water for said purpose during the year 1871, and was absolutely and illegally refused it by the city; that he applied for and proposed to use ten thousand gallons per day in his said business, which is the customary amount, and tendered the city the money for that quantity for the whole year, 1871, according to the regular tariff for water established by said city, but was refused without any

lawful cause; in consequence of which his business was entirely broken up, and he was deprived of a legitimate occupation, worth to him fifteen thousand dollars annually. He therefore prays for twenty thousand dollars damages. The defendant pleaded the general denial; specially denied the right of every citizen, upon tendering the payment of the public water rates, to obtain daily from the waterworks water to sprinkle the streets of New Orleans, the said waterworks being established to accommodate the citizens for ordinary purposes sufficient for the use of families, etc. The defendant also denied that the plaintiff ever had any serious purpose of paying the water rates in such quantity, but believes he merely so pretended with the view of being refused, and then bringing his action for damages.

The case was tried by a jury, and resulted in a verdict and judgment in favor of plaintiff for five thousand dollars damages. It appears that the business of sprinkling the streets, for such compensation as the owners of property might voluntarily agree to give, is an ancient occupation in this city, and that the plaintiff pursued it in 1869 and 1870, obtaining the water from the public waterworks; it is shown that he had considerable capital invested, and that it was becoming very profitable, yielding a net income in 1870 of eight thousand dollars; that early in 1871 he made contracts for sprinkling the streets, having many new subscribers, but that the city of New Orleans refused to allow him to get water for the purpose of continuing his business from the public waterworks, although he tendered the money to pay the public water rates; and in consequence his business was broken up.

Early in 1871, the Administrator of the Department of Waterworks wrote the following letter to the plaintiff: "The city of New Orleans having disposed of the *privilege of water* from the plugs of the city waterworks, for street sprinkling purposes, for one year from first of January, 1871, unto Joseph Elliott, Esq., the application made by you this day for similar privileges can not be entertained."

I think the plaintiff had the right to get the water necessary for his business from the public waterworks, on paying the usual tariff or water rates; that the Administrator of Waterworks Department was wholly unauthorized to refuse it when the money was tendered; and that he had no right to create the monopoly in favor of Elliott, by giving him the exclusive use of the plugs of the city waterworks for the purpose of sprinkling the streets.

For over thirty-five years various persons have pursued the occupation of sprinkling the streets for such compensation as the occupants of dwellings and business establishments might agree to pay them, the privilege of getting water from the waterworks being free to all who were willing to pay the regular water rates.

It was not till after the city purchased the waterworks from the Commercial Bank, in 1868, that the monopoly complained of was established.

Now, because the plaintiff enjoyed the exclusive "*privilege of water from the plugs,*" in 1869 and 1870, and also bid for it in 1871, is no reason why he should not complain of the monopoly, if it is wrong in principle, and if it is unauthorized by the charter granted by the State to the Commercial Bank of New Orleans, from whom the city acquired it. Of course the plaintiff had no cause to complain as long as he could get the water; and, besides, it seems he was willing to pay the sums he did in 1869 and 1870 for the *exclusive privilege*. But when he was denied it he had cause to complain, provided the monopoly was wrong. An illegal and arbitrary exercise of power may be inquired into at any time the person or persons affected thereby may feel aggrieved.

Because the city or its official abused a trust in 1869 and 1870, is no reason why it should do so with impunity in 1871.

What was the object of the charter, the contract between the State and the corporation, called the Commercial Bank of New Orleans, granted in 1833? It was obviously to supply the city of New Orleans and its inhabitants amply with water, at a fair price, not only for the ordinary use of families, but for every purpose necessary for the health, convenience and safety of the city and its population. The thirty-eighth section of the charter requires said company "to place hydrants at a suitable distance from each other, from which a sufficient quantity of water may conveniently be drawn for extinguishing fires, and for wetting, washing and sprinkling the streets." The fourth section provides that after thirty-five years New Orleans may purchase the waterworks from the company; and this was done, as before remarked, in 1868.

Now, I think it will not require serious argument to prove that this perpetual charter or contract between the State and the Commercial Bank has not been altered, so far as the rights of the inhabitants of New Orleans are concerned, by the transfer thereof to the city in 1868. The city has, by the purchase, merely succeeded to the rights and obligations imposed on the original incorporators by the charter or contract between them and the State. Under the purchase, which was anticipated when the charter was granted, the city is bound to carry out the contract and perform all the obligations thereof in favor of the inhabitants, the real parties for whose benefit the charter or contract was made by the State.

New Orleans as a legal entity, had no interest in the contract whatever. The inhabitants own the city, and are the parties intended to be benefited by the stipulations in the charter. They are the obligees of the contract, and, in my opinion, can compel the city to perform the obligations thereof which she assumed when she became the purchaser of the waterworks.

There is no force in the objection that the stipulation of section thirty-eight is in favor of the city, and therefore the inhabitants can not complain if they are not furnished water to extinguish fires and to sprinkle the streets. This is a mere fallacy. The provision is really in favor of the inhabitants, who alone are interested in preserving their property from fire, and whose health and comfort would be advanced by sprinkling the streets. New Orleans, as a juridical person, or legal entity, needs no water. The consumers of water are the people who inhabit the city. The stipulation, therefore, of section thirty-eight of the charter, requiring the incorporators to place hydrants at suitable distances in order to furnish a sufficient quantity of water for extinguishing fires, and for "*wetting, washing and sprinkling the streets*," is for the benefit of the inhabitants; and they have the right to complain if they are denied the privilege of getting water freely from these public hydrants.

The charter would cease to be a contract if the city, by the purchase, acquired all the rights and privileges of the waterworks company, and incurred none of the corresponding obligations. The State might at once incorporate another company, and would not, in doing so, impair the obligation of a contract.

The right of the city to control the waterworks would cease, because the basis of her title, the contract made by the State with the incorporators can not exist without reciprocal obligations. So, therefore, if the city has the rights of the Commercial Bank, resulting from the purchase, to administer the public waterworks, it also is bound to perform the corresponding obligations of its vendor.

The contract being a perpetual one, made by the State for the benefit of the inhabitants, their rights were not destroyed by the transfer from the original incorporators to the city of New Orleans in 1868.

The inhabitants of New Orleans are not deprived by it of their rights; and they have just cause to complain, if they are not amply supplied with all the water necessary for their comfort and convenience, as well as their actual necessities.

They have the right to demand from the waterworks sufficient water to sprinkle the streets in front of their houses; they have the right to employ the plaintiff to perform this service for them; and the Administrator of the Department of Waterworks had no right to refuse to supply him the necessary water, when the usual price thereof was tendered.

It is not pretended that there was not sufficient water to supply the plaintiff; the defense is simply a general denial; a special denial of the right of the citizen to demand more than is necessary for family purposes; and an averment that the plaintiff was not serious in tendering the money and demanding the water from the waterworks. If



the plaintiff was not serious, why refuse him? Why decline to take the money? But the evidence shows that the plaintiff was building up a very profitable business; it yielded him a net profit of eight thousand dollars in 1870, and he was already employed by numerous persons to sprinkle the streets in 1871, having many new subscribers.

The actual loss he sustained was not only that resulting from the sale of his carts and mules, but the loss resulting from the breaking up of his business.

If the defendant had no right to refuse him water from the public waterworks, and in consequence thereof the business which he had built up was destroyed, he has a just ground to claim remuneration for the loss of that business. The jury found the actual loss sustained by the plaintiff was five thousand dollars, and I think the evidence in the record fully sustains their verdict.

If the position of the defendant be true, the provision of section thirty-eight of the charter of the waterworks is meaningless. For it would be useless to require the incorporators to place hydrants at suitable distances to supply ample water to extinguish fires and for "*wetting, washing and sprinkling the streets*," if the people would have no right to use the water in those hydrants for that purpose.

What is the use of providing the hydrants if those to be benefited thereby have not the right to use them? If the people have no right to sprinkle the streets, why cause hydrants to be erected for the purpose?

But defendant contends that it has conferred this duty upon Elliott for the year 1871, and he paid it two thousand dollars for the privilege.

Here is another fallacy. Elliott has made no contract with the city binding him to sprinkle the streets. He is not required to cast a single drop of water on the streets. He has simply purchased "*the privilege of water from the plugs of the city waterworks*" for the year 1871. He gave the pittance of two thousand dollars for the exclusive privilege, and he is not bound to use it; he can refuse to sprinkle the streets; and yet the inhabitants are forbidden from getting water from the public fountain for that purpose for a whole year. If the administrator had the right to sell Elliott the exclusive "*privilege of water from the plugs*" for one year he could do so for any number of years; and thus "*the plugs*" might be permanently closed, and the inhabitants deprived of one of the main objects of the waterworks.

Where is the right of those entrusted by the State with the administration of the public waterworks to sell out and destroy the rights they were charged to protect and to administer? Are the duties and obligations imposed by the State in the act of incorporation upon the Commercial Bank and its transferree thus to be disregarded; the object of the charter thus to be defeated, and the rights of the citizens in-

tended to be preserved, thus *bargained away* by those intrusted with the administration of a public institution? Suppose the Gas Company, another public institution, or an institution established for the benefit of the inhabitants of New Orleans, should pursue the same course adopted by the Administrator of the Waterworks, and sell out the privilege of gas from its reservoir to a single person for a year, would the citizens have no cause to complain? Are the citizens to be shut off from the waterworks and to be shut off from the gas works according to the whims or caprices of those administering these public institutions? Surely not. The incorporators have contracted with the State; they acquired certain rights and privileges, and they incurred corresponding obligations to be performed for the benefit of the inhabitants of New Orleans.

In *Scudder v. Paulding*, 4 Robinson 429, where the gas company refused to supply the lessee of the Planters' Hotel because the former tenant had failed to pay his gas bill, this court held—that the lease entitled the plaintiff to call on the company for gas on offering to pay for it; and if he was improperly refused, his "remedy was against the company."

Here the plaintiff called upon the Administrator of Waterworks and tendered him the price for water to sprinkle the streets; he was improperly refused, as I believe, and his remedy is against the defendant, who by the purchase of 1868 succeeded to all the duties and obligations, as well as the rights of the original incorporators.

But the defendant contends that New Orleans had the right to refuse the plaintiff the water, in the exercise of its police power. If the use of the water at the time was detrimental to good order, to the safety and health of the public, or if the way it was used was a nuisance, of course the city in the exercise of its police power had the right to do so; it has the right to regulate the use of the gas also in the proper exercise of police power; it had the right to regulate the use of water while the waterworks were administered by the original incorporators.

But the best answer to this objection is: the city has not seen fit to impose any restriction on the plaintiff in the exercise of its police power. The plaintiff was not refused on account of the exercise of police power by the city. The right of the city in relation to the exercise of police power is not involved in this case; it is not an issue raised by the pleadings or an issue upon which the parties went to trial in the court below. It is an after-thought, a mere dodge suggested by the ingenuity of counsel. It can not avail to confuse the real merits of the controversy, and to bolster up a defense which, in my opinion, rests upon no solid foundation in law or equity. For the reasons stated I deem it my duty to dissent.

Rehearing refused.

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Marie Mathilde, Countess de Bethune, v. Levy & Scheuer.

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NO. 3967.—MARIE MATHILDE, COUNTESS DE BETHUNE, v. LEVY, & SCHEUER.

If two witnesses testify to a verbal contract of lease, one being a party to the lease and the other not being a party, and has no interest in the lease, and their testimony is conflicting, in such case the weight of the evidence will be given in favor of the witness who has no interest in the result of the suit.

**A** PPEAL from the Fourth District Court, parish of Orleans. *Leamont, J. T. Gilmore & Son*, for plaintiff and appellant. *Cotton & Levy*, for defendants and appellees.

TALIAFERRO, J. The plaintiff sues on a contract of lease. She alleges that by her agent she leased, in the year 1871, to the defendants for the term of one year, to commence on the first of October, 1871, the house or premises No. 1, southwest corner of Canal and Magazine streets, in New Orleans, for the sum of three hundred and fifty dollars per month. The plaintiff sues for five months rent, or \$1750, due at the time of filing her supplemental petition. The defendants deny that they entered into the contract declared upon by the plaintiff. They had judgment in the lower court, and the plaintiff has appealed. In deciding this case, we have to determine from the evidence whether there was a valid binding contract between the parties verbally made by them, notwithstanding the defendants failed or refused to sign a written instrument of lease and to execute notes for the payment of the rent monthly as they agreed to do. Downing, a witness whose testimony was taken under commission, says: "All that I know about the lease of said store is, that Mr. Ernest, the agent of the plaintiff, told me that he had rented the store from the expiration of my lease to Levy & Scheuer, and that on my calling on them, as I have already stated, to see them about my fixtures, they admitted to me that they had rented the store from Mr. Ernest. I think they said their lease was for the period of a year, but I am not positive about that." This witness had been the tenant of the leased premises the previous year, and wanted to sell to Levy & Scheuer his fixtures, which they declined to purchase. In relation to these fixtures the witness, in answer to one of the interrogatories, said: "Subsequently, on being informed by them (Levy & Scheuer) that they were trying to sublet the store, I requested them in case they should succeed in doing so, to try to sell my fixtures for me to the next tenant, which they promised to do." Ernest, the agent of the plaintiff, said in his testimony: "I closed the lease with them on the eighth of July at the rate of \$350, per month from the first of October, 1871, to first of October, 1872. In answer to a cross interrogatory, he said the lease was to be in writing, and notes to be given; that on separating with Mr. Scheuer on the morning of the eighth of July, I told him that the notes and lease would be sent to him some time for his signature. He said to send

them to him and he would sign them ; we parted in that way." Frederick Ernest, nephew of the plaintiff's agent, testified "that about three days before the lease was closed Scheuer, I think, of the firm, came to Ernest, Sr., and asked for the refusal of the two houses until he could see which one he could take. At the same time there were other applicants for it ; the refusal was given to him for three days ; he came back at the expiration of the time and closed the agreement for No. 1, the corner house ; the understanding was that he was to sign the lease and notes and pay the revenue stamp for the lease whenever it was presented to him ; that is about the whole transaction." In reply to the question, "was the bargain concluded ?" the witness answered : "It was undoubtedly concluded in my presence." He stated that in September he presented the lease and notes to be signed and the parties refused to sign them. This witness, under cross-examination, was interrogated as to whether he did not, in September, advertise the store for rent, and his attention was directed to an advertisement to that effect that appeared in the New Orleans Times of the twenty-fourth September, 1871. He answered : " Mr. Scheuer came to me and asked if he could make a compromise to be released from the rent. I told him positively, No ! that no sum would induce me to do it, acting as agent. He then asked me to put a notice in the paper that the house was for rent, at his expense and his risk, and my letter to Mr. Montgomery will show that. I did that ; I wrote that it had been done at the risk of Levy & Scheuer." Re-examined by plaintiff's counsel. To the question, please state particularly why you advertised, he answered : "I did it at the request and as a matter of accommodation to the firm of Levy & Scheuer, purely out of courtesy, and nothing else." To the question was there any time stated during which the notes and lease were to be signed, he replied : " No, sir ; he said to send them around any time. I usually make them out the latter end of June for the ensuing year ; the lease commences on the first of October ; the lease and notes are made out and handed to the tenants, and they take their time by the first of October ; they lie very frequently in the hands of the tenants for two months ; I am not importunate about it." Scheuer, one of the defendants, and a bookkeeper of the firm of Levy & Scheuer, are the only witnesses examined on behalf of the defendants. The testimony of the bookkeeper is unimportant. He states that on the twenty-eighth of September a man came into the office and handed him some papers, which he found, upon opening, to be a lease and some promissory notes to be signed ; these he handed to Mr. Scheuer, who refused to sign them, and they were given back to the person who brought them. An hour later Mr. Ernest came in and presented the same papers to Mr. Scheuer, who again refused to sign the lease, saying that he had been released from the lease. On the first of October the

keys of the store were presented at the store and were refused by Mr. Scheuer. Scheuer denies having asked Ernest if he could be released by paying a certain amount. He also denies authorizing him to advertise. He said the bargain was not completed, because he might have objected to some clause in the lease when he was to sign it. Here is a conflict of evidence in regard to material facts, and the evidence must be scrutinized closely. It must be borne in mind that Scheuer is his own witness; that he is testifying for himself and for his partner. The two Ernests have no interest in the case. Scheuer has a large interest in the result. If his testimony is to prevail, his firm would be released from the payment of a large sum. Much is to be taken into consideration regarding the manner in which a witness makes his statements. There is a marked contrast in this respect between the witness in this case who testifies in his own favor and those who have no personal interest. The testimony of the former is manifestly devoid of that distinctness, fullness and clearness which characterize that of the latter. It is to be noted, also, that the evidence of three witnesses disinterested is in array against that of one who *is interested*, and we must conclude that it preponderates against the defendants. Downing, the previous lessee, heard the declarations of both parties that they had made a contract of lease. He swears that he was informed by Levy & Scheuer that they were trying to sublet the store. The statements of the other two are clear and positive of the completion of the contract verbally. It is shown, we think, satisfactorily, that it was not the meaning and intention of the parties that the signing of the notes and the instrument of lease should be necessary to the completion of their contract. We can not but consider the evidence as establishing that both parties believed the verbal contract complete, and that they were bound by it without signing written acts; that the signature of these acts was not in any manner a condition precedent to the completion of the contract. If the defendants did not consider themselves vested with the rights of leasees, why were they trying to sublet the premises? This statement of one of the witnesses that they told him they were trying to make a sublease, is not denied by Scheuer in his evidence. Why should they aim to effect a compromise to be released if they did not believe they were bound? And why authorize Ernest to advertise the letting of the premises at their expense and risk, if it were not to avoid the effects, as far as they could, of their non-compliance with the contract by getting other tenants for the plaintiff? An effort was made by the introduction of the advertisement in the Times newspaper of the premises for lease to show that the plaintiff's agent considered the agreement with Levy & Scheuer as of no effect. But we think there was a failure in the effort. The clear and direct statement of the witness, reiterated as it was, that the advertisement was made at the

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special request of one of the defendants, and through courtesy to them, must be taken as carrying greater weight than the less consistent statements of the witness having an interest in procuring a different interpretation of the cause of the advertisement. We think, upon the whole, the judgment of the lower court is erroneous. It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed. It is further ordered that the plaintiff recover from the defendants the sum of seventeen hundred and fifty dollars, with legal interest on each of the five installments thereof of three hundred and fifty dollars each from the falling due respectively of each installment. It is further ordered that defendants pay costs in both courts.

Rehearing refused.

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No. 4030.—STATE ex rel. SIMONDS v. JUDGE OF THE SIXTH DISTRICT COURT.

A third party, whose property has been taken out of his possession by a proceeding under a judgment for a less amount than five hundred dollars, has the right to appeal, if the amount of property taken is above five hundred dollars; and in case the judge *a quo* refuses the appeal, a mandamus will issue from the Supreme Court, on the application of such third party, directing the judge *a quo* to grant the appeal.

**A**PPPLICATION for writ of mandamus. *Bentinck Egan*, for relator; *W. H. Cooley*, Judge of the Sixth District Court of the parish of Orleans, respondent.

Howe, J. Choppin, a judgment creditor of Wilson for \$175, issued execution and seized the alleged interest of his debtor in the firm of J. S. Simonds & Co. He then filed a petition, to which he made Simonds and the firm parties, in which he alleged that Wilson was a partner in the firm, that the seizure of his interest operated a dissolution, and that a liquidation of the firm was necessary; and he asked for the appointment of a receiver. A receiver was appointed, to whom the assets of the firm were to be turned over. Simonds having departed this life, his administratrix, within the legal delay, applied for an appeal, which was refused on the ground, as stated in the respondent's answer, that the amount in dispute was only the \$175 due by Wilson to Choppin.

We think the judge erred. The matter in dispute is not the amount of the debt due by Wilson to Choppin. The defendant Wilson is not arresting the judgment. The firm of Simonds & Co. and Simonds's estate are not in the position of the garnishees in *Gustine v. The New Orleans Oil Company*, 13 An. 510, cited by respondent. The matter in dispute is the possession and control of the whole assets of the firm of Simonds & Co. The question is whether they shall be turned over to a receiver or not, and it appears they amount to over \$1000.

In *Gustine's case* the court admitted that an appeal would lie "where a third person in possession of property finds himself deprived of it by the unlawful action of the sheriff" in seizing it. And so in the case of *Mills*, 12 An. 48, it was held that the value of property seized under execution, the sale of which is enjoined by a third person claiming to be owner, and not the amount of the writ, determines the right of appeal. The same was held in *Gogreve v. Windhorst*, 21 An. 296, and a similar doctrine in the *Succession of Rennebey*, 15 An. 661.

The same principle governs this case. A judgment is rendered directing the transfer to a receiver of the assets of a firm. The administratrix alleging herself to be in possession and control of these assets; that Wilson has no interest in them, and that her interest in them exceeds \$500, declares this judgment erroneous and irreparably injurious, and claims an appeal. She seems to have a constitutional right thereto, for, if the judgment be erroneous, she will be unlawfully deprived of property exceeding \$500 in value.

It is ordered that the mandamus heretofore issued be made peremptory.

No. 2737.—P. O. FAZENDE v. WILLIAM W. FLOOD—MRS. THOMAS J. FRIEND, Appellant.

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In case of an appeal from an order of seizure and sale, the only question that can be examined by the appellate court is the sufficiency of the evidence before the judge *a quo* to authorize the issuing of the writ.

Costs incurred in protesting a mortgage note should be taxed as such by the judge who issues the order of seizure and sale on the note, and authentic evidence thereof is not essential.

**A**PPEAL from the Second Judicial District Court, parish of Jefferson. *Pardee, J. E. Bermudez*, for plaintiff and appellee; *J. Q. A. Fellows* and *R. L. Preston*, for defendant and appellant.

WYLY, J. This is an appeal by the third possessor of mortgaged property from an order of seizure and sale.

The only inquiry is, had the judge who issued the order sufficient evidence before him to authorize the fiat? 18 An. 626; 21 An. 32, 52; 21 An. 626.

It appears that the plaintiff presented a certified copy of the act of mortgage, importing a confession of judgment, and also the note.

The evidence was sufficient to justify the order.

The cost of protest was an expense incident to the collection of the claim, and it may be recovered as part of the costs in the executory proceeding.

The appellant purchased the property incumbered with the mortgage which contained the non-alienation clause. She certainly occu-

pies no better position than the mortgagees. The other objections are of no force.

The appellee prays damages for frivolous appeal, and they should be allowed him.

Let the judgment be affirmed with costs, and let the plaintiff recover from the appellant ten per cent. damages on the amount of the decree appealed from.

#### ON MOTION TO DISMISS.

TALIAFERRO, J. Fazende, the vendor of real estate to Flood, retained a mortgage by authentic act, with the pact *de non alienando*, to secure the payment of the price. To enforce the payment of the first note, due January 1, 1870, he proceeded, *via executiva*, to foreclose his mortgage upon the property then in possession of Friend, to whose wife Flood had sold it. From the order of seizure and sale obtained by the plaintiff, Mrs. Friend, aided by her husband, prayed for and obtained a suspensive appeal, alleging in her petition that she has an interest in the proceedings, and that her rights are affected injuriously by the order; that there is error therein to her prejudice; that the order is not authorized by the record nor warranted by law.

In this court the plaintiff moves to dismiss the appeal, on three several grounds:

*First*—The appellant has no interest in the subject matter in dispute.

*Second*—That the defendant, who has an interest in the proceedings, has not been cited.

*Third*—No assignment of errors has been filed, the proceedings being regular and valid on their face.

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The mere averment of interest by a third person who appeals from a judgment rendered between other parties, has been held to be insufficient to authorize an appeal. 7 N. S. 345. In that case Porter, Judge, said: "This court has already decided that when persons not parties to a judgment appealed from it, they must allege and prove in the court of the first instance their right to do so—that is, that they were aggrieved by it." In the case before us there is nothing whatever, even alleging specifically, in what that interest consists. We think, on this ground, the motion to dismiss should prevail. 6 An. 529; 13 An. 199.

It is therefore ordered that this appeal be dismissed at the intervenor's costs.



No. 2500.—THOMAS C. HILLS v. MRS. S. T. UPTON AND MRS. E. HOUGH.

The authority of an agent to bind his principal by giving a promissory note and of fixing the signature of his principal thereto must be express and special. But in a cause like this, where the agent is authorized to settle a debt, the principal is not bound on the note which the agent gives in settlement of the debt, because the authority of the agent to sign the name of his principal to the note was not expressly given.

**A** PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Brice & Mitchell*, for plaintiff and appellant. *J. McConnell and Buddecke & Upton*, for defendants and appellees.

**TALIAFERRO, J.** The plaintiff sues the defendants on a joint promissory note signed by Mrs. Hough, one of the defendants, and by C. E. Whitney, who signed Mrs. Upton's name to it as her agent.

The separate answers of the defendants are general denials. Mrs. Hough admits she signed the note, but denies that any consideration was ever given or paid for the note by the plaintiff. The other defendant, Mrs. Upton, specially denies having authorized Whitney to sign the note sued on. There was judgment in the court *a qua* in favor of the defendants, rejecting the plaintiff's demand and the plaintiff appeals. It appears from the evidence that the two defendants are sisters, and own a plantation jointly in the parish of Iberville. The note was given to one Parker for his services as superintendent and manager of the plantation during the year 1867, and who transferred the note to Hills, the plaintiff. The plantation, it seems, was leased the next year to Kelly. At the close of the year 1867, or early in 1868, it became necessary, prior to delivery of the place under the lease, to make settlements with the owner and the laborers for their services during the year 1867. The settlements were made by Mrs. Hough, who was on the plantation, and by Whitney, the son-in-law of Mrs. Upton, who was residing in New Orleans, but at that time was unable to go up to the place. Whitney proposed to go and attend to the business of the plantation for her, and he states in his testimony that Mrs. Upton told him to settle the matter as well as he could and get as much time for payments as possible. It is not shown that Whitney was in any manner authorized to make or sign any obligation to bind her for the payment of money. There is nothing to show that she ever ratified the act. An instrument, signed in the same manner that the note is signed, showing the contract with Parker for his services for the year 1867, is in evidence. It is dated February 11, 1867. A letter is also in evidence dated fourteenth January, about a month previous, written by Mrs. Upton to Parker, expressing her desire to engage him again as manager for that year (1867), Parker having been on the plantation in the capacity of manager for several years previous.

The note sued upon is for \$603, and drawn payable to the order of William R. Parker. Mrs. Upton says in her own testimony that she

never knew until a short time before the institution of this suit that such a note had been given, and we find nothing to discredit that statement, and the evidence does not satisfy us that she authorized Whitney to sign the note. The agent, if authorized to sign the note in the name of Mrs. Upton, rendered himself bound; but as he is not made a party defendant in this action no judgment can be rendered in this case in its present aspect. We think the case should be remanded for further proceedings. It is therefore ordered that the judgment of the district court be annulled, avoided and reversed. It is further ordered that this case be remanded to the court of the first instance, with leave to the parties to amend their pleadings, to the end that the proper parties may be made, and further to be proceeded with according to law—the defendants and appellees paying costs of the appeal.

No. 2799.—WILLIAM TERRILL v. HARRY T. HAYS et al.

Liquor or spirits that has been conditionally sold and its quality or character has been changed by the vendee from rum to that of neutral spirits, is liable in its changed condition to be seized by the creditors of the vendee, although it has not been paid for or actually delivered—the changing the liquor from one thing to another by the vendee being considered such a delivery as would protect the creditors who were without notice of the claim of the vendor.

**A** PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. G. Campbell and J. M. Cooney*, for plaintiff and appellee. *J. H. New and Hyams & Jonas*, for defendants and appellants.

HOWELL, J. Plaintiff enjoined the sale of "two hundred and sixty-six gallons of rum, converted into neutral spirits," seized in the suit of *Block v. Wallenberg*, on the ground that he was the owner thereof. Hays, the sheriff, filed a general denial and called Block and his surety on an indemnity bond in warranty. From a judgment against Hays for the value of the property he has appealed.

The facts are, that about the fourteenth March, 1867, plaintiff agreed to sell to Wallenberg seven barrels of rum on the condition that they were to be paid for before they were used, and were delivered under this condition at the rectifying establishment of said Wallenberg. Some days afterwards Wallenberg caused the barrels to be emptied into his rectifier and the contents converted into neutral spirits. During the time plaintiff made several demands for payment, Wallenberg telling him on one occasion after the conversion that on the arrival of a certain schooner he would pay for the property. Prior to this event the establishment of Wallenberg and its contents were seized in the suit of *Block*—the liquor, as neutral spirits, still being in the cistern. The plaintiff, as a witness, says "the whole of the liquor I sold to Wallenberg was put into his rectifier."

Terrill v. Hays et al.

Although he repeatedly asserted that he was the owner of the liquor at the time of the seizure, we think it is shown that as to third persons without knowledge there was such a delivery to Wallenberg as to subject it (a movable) to seizure for the debts of Wallenberg, and particularly so, as it had been so materially altered as to its nature and packages or condition. The article sold by plaintiff was not the article seized. It had undergone a change and been enhanced in value. The bad faith of Wallenberg, the conditional vendee, will not shield the property from his creditor, who was ignorant of the facts when the seizure was made.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of defendant H. T. Hays, with costs in both courts.

No. 3472.—STATE OF LOUISIANA ex rel. GEO. ALBAN et als. v. JAMES GRAHAM, State Auditor.

In a case where the Legislature has by law authorized the making of a contract to improve and clean out a navigable stream, and has made an appropriation therefor, the Auditor of Public Accounts is not authorized to issue certificates of indebtedness for such work or parts thereof, as may appear to have been done in conformity with the requirements of the act authorizing it. Section 187 of the Revised Statutes of 1870, which authorizes the Auditor to issue his certificates for all just indebtedness against the State, which is not provided for by law, does not apply to such a case, because its payment is provided for by appropriation of bonds of the State. A mandamus will not therefore lie against the Auditor to compel him to give certificates of indebtedness in such a case.

**A** PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. Wooldridge & Thomas*, for relators and appellees. *Hornor & Benedict*, for the Auditor. *S. Belden*, Attorney General, for the State.

**WYLY, J.** The defendant appeals from the judgment rendering peremptory the mandamus sued out in this case, to compel him to issue to the relators \$50,000 of State certificates as an alleged indebtedness resulting from a contract which they say they made for improving the navigation of Red River, pursuant to act No. 59 of the acts of 1868.

The defense is:

*First*—There is no ground for the mandamus, as the act No. 59 provides for the issuance of bonds for the payment of the contemplated work, and the Governor having refused to sign them the respondent can not deliver them to the relators; and as the law has made a special appropriation of bonds for the payment of the contemplated work, the respondent is without power to issue certificates of indebtedness.

*Second*—That act No. 59 of 1868, violates article 111 of the constitution.

*Third*—The respondent specially denies that any valid contract was

made, or that the provisions of said act have been complied with, or that the certificates of the commissioners called for by said act were ever presented to him. He also pleads the general denial.

Act No. 59, authorizing certain works to be done to improve the navigation of Red River, provides—

Section 2. "That in order to have the above works completed during the present low water, Wm. S. Mudgett, M. H. Crowell and Charles W. Keeting be and are hereby appointed commissioners on behalf of the State, and hereby authorized to employ a competent engineer, and to have him without delay to examine said work and prepare plans and specifications of the work to be done, and to make the same so as to show the proposed and necessary work in convenient sections, with estimates of the proper cost of each section and of the whole work.

Section 3. "That as soon as said estimates, plans and specifications are prepared, said commissioners shall and they are hereby authorized to contract in the name of the State of Louisiana, with a competent person or persons, to do said work according to such plan and specifications, payable in installments at the completion of each section, and upon the certificates of said commissioners that the section has been completed according to contract."

Sections 4, 5 and 6 relate to the bonds to be issued to the contractor in payment of the work.

Section 7 provides that the commissioners mentioned in the act shall turn over the management of the work to the Board of Public Works as soon as they organize, and they "shall do all things required to be done by said commissioners by this act."

It will be observed that the debt for the contemplated work is only payable on "the certificates of said commissioners; that the section has been completed according to contract," and that the Board of Public Works, when organized, shall supersede the commissioners named in the act, and "shall do all things required to be done by said commissioners." \* \* \* Therefore, in order to obtain the bonds according to the act, the contractors must produce the certificate of the commissioners, or of the Board of Public Works, "that the section has been completed according to contract."

This has not been done; and without it the relators would not be entitled to the bonds appropriated by the act under which the work was authorized. There is no satisfactory evidence in the record that the relators ever made a contract pursuant to the requirements of the statute, or that they have completed the section for which they demand payment, according to the contract.

The relators have not presented a case entitling them to be paid, according to the express terms of act No. 59 of the acts of 1868.

Where the law has made an appropriation of bonds as in the statute

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State ex rel. Alban et al. v. Graham, Auditor.

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before us, the Auditor is not authorized to issue certificates under the general mandate mentioned in sec. 187 of the Revised Statutes of 1870.

We think he very properly refused to comply with the demand of the relators, and the court *a qua* erred in granting the mandamus and in making it peremptory.

Let the judgment appealed from be annulled, and let the mandamus be disallowed and the petition be dismissed at the costs of the relators in both courts.

Rehearing refused.

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No. 3891.—SUCCESSION OF JOHN H. WILLIAMS.

In this case the community property of the succession was sold on the motion of the creditors to pay the debts. The purchasers failed to comply with their bids, and the creditors moved to have it again sold at their risk. In answer to the rule against the purchasers, they alleged that the deceased left three daughters by a former marriage, who claim to be the owners of one-half of said property as the heirs of their mother, who is dead. It not appearing that the mother of these parties was dead, and the property being community, the rule was made absolute, and the purchasers appealed.

Held—That it was incumbent on the defendants in the rule to show that the mother died since the acquisition of the property, and that the debts for which it was sold were contracted since her death.

**A**PPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. Dirhammer & Kennard* and *T. Gilmore*, for appellants. *Budd & Grover*, for appellee.

HOWELL, J. Rule on purchasers. Upon the motion of a creditor and the petition of the testamentary executrix, all the real estate of this succession was sold to pay debts. The purchasers at said sale having refused to comply with the adjudication, a rule was taken on them to show cause why they should not do so, or in default, why the property should not again be sold at their risk. In answer to the rule, they alleged that the deceased left three daughters by a first marriage, who claim to be the owners of one-half of said property as the heirs of their mother, who is dead. Those persons were mere parties to the rule, and from a judgment making it absolute they and the purchasers have appealed.

The district judge was not satisfied from the evidence that the mother of these daughters is dead, and a careful examination of the evidence has not convinced us that he erred. It was incumbent on the defendants in the rule to show that this mother did sign the acquisition of the property, and that the debts for which it was sold were contracted since her death. This they have not done. The sale, under all the presumptions, was of community property to pay community debts, and these presumptions not being overcome, the sale was valid.

Judgment affirmed.

No. 3905. — STATE OF LOUISIANA ON THE INFORMATION OF JOSEPH WITTGENSEIN v. F. J. HERRON AND J. W. FAIRFAX.

The suspension by the Governor of the Secretary of State from office did not create a vacancy in the office of Secretary of State, and the Governor is without the power to appoint a Secretary of State unless a vacancy has occurred in the office, and then only *ad interim*, as provided by the constitution. In case the Governor has appointed a person to take charge of the office during the suspension of the Secretary of State, such person so appointed is only clothed with ministerial duties, and the appointment of an Assistant Secretary of State by such person is absolutely void, because the power of appointing an Assistant Secretary of State is conferred upon the Secretary of State alone, and is not a ministerial act.

**A** PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. S. Belden*, Attorney General, for the State; *A. P. Field* and *J. Q. A. Fellows*, for relator; *Semmes & Mott*, for defendants and appellees.

**TALIAFERRO, J.** Wittgenstein, the relator in this case, brings this suit in conformity with the provisions of the intrusion act, complaining that he was illegally ejected from the office of Assistant Secretary of State by F. J. Herron, himself an intruder into and unlawfully exercising the functions of Secretary of State, and who, by the illegal exercise of the powers thereof, appointed in relator's place and stead one John W. Fairfax, who, under color of this pretended appointment, has illegally intruded into and assumes to exercise the duties of relator's office. F. J. Herron was made a party to the suit, and the relator prays that Herron and Fairfax be declared by judicial decree intruders in office; that he be decreed entitled to the office of Assistant Secretary of State, and that he be put in possession of the office and all the papers and archives belonging to the same.

Exceptions were filed by the defendants to the mode of proceeding. Fairfax excepted on the ground that the right to the two offices held by two different individuals can not be inquired into in the same suit. He answered further, in case his exception were overruled, denying the plaintiff's allegations and pleading in substance his rightful tenure of the office. The exception taken on the part of Herron is to the same import, with the additional plea of *res judicata*. In the court below the exception was sustained and the suit dismissed.

The relator has appealed.

It was not necessary, in the action of the relator in seeking his rights, to incorporate a proceeding against Herron to have him decreed to be an intruder. There was an unnecessary and improper joinder of parties. Eliminating, therefore, from the action the extraneous portion of it, we shall proceed to an examination of the issue between Wittgenstein and Fairfax in regard to the office of Assistant Secretary of State. The Governor suspended the Secretary of State from the exercise of his functions as a State officer. No vacancy in the office of Secretary of State thereby arose. The Governor is without power

State of Louisiana on the Information of Wittgenstein v. Herron and Fairfax.

to appoint a Secretary of State unless a vacancy occur in the office, and then only *ad interim*, as provided by the constitution.

Conceding that in case of the suspension of a Secretary of State from the performance of the duties of the office, the Governor would have, on general principles, the right to appoint a person to discharge the duties of Secretary of State, upon which we express no opinion, the person so appointed would be clothed only with ministerial duties, such as arise in the usual routine of office business. The Secretary of State is vested by law with the power to appoint an Assistant Secretary of State. This is not a mere ministerial duty. The person charged with the performance of the ministerial duties of the Secretary of State during his suspension from office is without power to remove from office, and much less without the power to appoint to office an assistant secretary for the reason that he himself is not Secretary of State.

The appointment of Fairfax to the office of Assistant Secretary of State by Herron is, therefore, nugatory and without effect. Wittgenstein's right to that office was in no manner impaired by the action taken in the matter by Herron. The suspension of Bovee from office by the Governor did not affect the right of Wittgenstein to discharge the duties of the office of Assistant Secretary of State, and the ejection of the latter from office was without warrant or authority of law.

We think the judgment of the court *a qua* erroneous. It is therefore ordered that the judgment of the District Court be annulled, avoided and reversed. It is further ordered that this case be remanded to the court of the first instance, to be proceeded with in accordance with the views herein expressed and according to law, the defendant and appellee Fairfax paying costs of this appeal.

#### NO. 2510.—J. R. WOLF v. MITCHELL, CRAIG & Co.

In this case the evidence shows that plaintiff had several conversations with defendants, or some of them, in reference to the leasing of certain houses and tenements for a store on Canal street; that the parties intended to perfect their agreement about the lease by reducing it to writing. It was never reduced to writing, and the plaintiff now seeks to enforce it as a verbal lease.

Held—That it being shown that it was the obvious intention of the parties to reduce the terms of the lease to writing before it was considered as complete, that the defendants, as lessors, could not be held on the plaintiff's showing a verbal lease merely.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. W. H. Hunt*, for plaintiff and appellant. *Roselius & Phillips*, for defendants and appellees.

HOWELL, J. In December, 1867, the plaintiff sued upon an alleged verbal contract of lease entered into between himself, through his agent J. A. Blaffer, and the commercial firm of Mitchell, Craig & Co.,

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51	1729
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on the eighth of June, 1867, of two stores on Canal street, for five years, commencing on the first of August, 1867, and ending on the thirty-first of July, 1872, for the price of \$9000 for the first year, \$10,000 for the second year, and \$12,000 each for the successive years, payable in monthly installments at the end of each month.

The defendants pleaded the general issue, and alleged "that they did contemplate making a contract for the hiring of the property mentioned in said petition, and had a conversation with said Blaffer at the time mentioned in said petition, but that a contract was to be made in writing at a future day, and before said day arrived, defendants refused to make that contract, or any other contract in relation to said stores, and notified said Wolf, through his agent, that they should not make any contract of hire of said property. And they allege that they never did make any contract with said Wolf or his agent, either verbally or otherwise, for the hire of said property." Subsequently the administrator of J. R. Craig, who died pending the suit, answered, "that the acts of said Craig in the premises were not valid and binding on said firm or succession; that at the time charged in said petition he was drunk, and was incapable of giving a valid consent to the pretended contract of lease set forth in the petition, and that no binding contract was then made or could be made by said Craig."

From a judgment in favor of plaintiff enforcing the lease the defendants appealed.

The question arises, does the evidence establish the contract declared on as complete between the parties? We think not.

In making a contract of the extent, amount and importance of the one under consideration, it is reasonable that the parties should have reduced it to writing so as to make it binding in all its stipulations before considering it finally closed, and we think the evidence shows that such was the intention of the parties in this instance.

Blaffer, after stating the conversation in which the general terms of the lease were discussed and agreed to, says: "I then told Mr. Craig that for the purpose of making this contract binding on both parties, we had better repair at once to the office of Gottchalk & Magner, notaries public, there to draw up a writing embracing what had been done and said," which Craig declined to do at that time. He says they then "went to the office of Mitchell, Craig & Co., and there met Mr. Rayburn. The entire agreement and understanding that had previously taken place between Mr. Craig and myself at the building and on our way to the office, were there repeated in presence of Mr. Rayburn." This witness says: "He (Craig) and Mr. Blaffer came into the office together; one of them said, 'here is Mr. Rayburn, we can fix it up before him.' Then they spoke in regard to the leasing of the stores on Canal street, and they did not decide. The difficulty was in



regard to the rent—the time it should commence. Nothing said about making rent notes in my presence. The terms they proposed were to take the stores on five years lease, the first year \$9000, the second year \$10,000, and the third, fourth and fifth years \$12,000. That was put in pencil on a slip of paper by Mr. Blaffer. Then Mr. Blaffer wanted him to go to the notaries, Messrs. Gottschalk & Magner, to have the lease drawn up and signed, and Mr. Craig declined to do so. That is all that transpired in the office." In answer to questions, he stated he was sure the lease was to be written, "because Mr. Blaffer insisted on it. When Mr. Craig would not go to a notary at once, Mr. Blaffer wanted something drawn up in my presence to witness."

We must, under the evidence, regard the taking of the keys and ordering signs made as incidents in the progress of the negotiations, and that the contract of lease was only to be conclusive when reduced to writing, before which the defendants declined closing it.

It is therefore unnecessary to examine other questions of law and the second ground of defense presented.

Is it therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of defendants, with costs in both courts.

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No. 3803.—SUCCESSION OF ROSANNA HENDERSON—Opposition of the Heirs to the Tableau of the Executor.

An executor is accountable to the heirs for the rents which he is able to collect from the estate which he is administering, and he is entitled to charge the estate for necessary improvements which he places upon the property, which property must be compensated with rents that he has collected.

**A**PPEAL from Parish Court, parish of Rapides. *H. L. Datgre*, Parish Judge. *Ryan & White*, for executor. *Thomas C. Manning*, for opponents and appellants.

WYLY, J. The heirs appeal from the judgment amending and homologating the tableau and supplemental tableau filed by the testamentary executor of Rosanna Henderson.

The appellee prays the amendment of the judgment so far as relates to the fees claimed by the attorney of the succession, and the commissions of the executor asking the increase of both to the amount stated in the tableau. We think the judgment appealed from is correct. The executor has no right to charge commissions on the succession of Frank Henderson. The court allowed him two and a half per cent. on the inventory of the property of Rosanna Henderson, for whose estate he was appointed executor, and this is all he is allowed by law.

We think the court did not err in reducing the fee of the attorney

from \$2500 to \$1000, which is fair compensation for the services rendered to the succession.

As to the note made by the deceased in favor of the executor, no sufficient reason is shown why it should not remain on the tableau, and of course the owner thereof is entitled to the interest thereon.

The slaves, the cotton, and all the movable property having been partitioned among the heirs in 1863, shortly after the succession was opened, the executor had no active capital upon which he could derive income, unless the rent of the land in his charge be considered such.

Of course, during the war the land was unproductive, the slaves and other movable property being taken off by the heirs.

After the close of the war the executor returned to the place and found it in no condition to cultivate—the cabins and fencing being all destroyed by the army. He built some cabins and put up several miles of fence at his own expense. He also collected a small sum for rents. The court compensated the claim for improvements with the claim for rents, and this appears to be just and equitable. The heirs have no right to demand from the executor any more rents than he was able to collect. On the whole we find no reason to disturb the judgment of the court *a qua*.

Judgment affirmed.

NO. 2801.—F. F. FOLGER v. D. F. KENNER.

An iron safe which has been incased in a brick wall, with its foundation laid in bricks and mortar or plaster, is an immovable by destination, and can not be recovered by a person claiming it, separate and apart from the buildings and premises in which it is so located.

**A**PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Breaux & Fenner*, for plaintiff and appellee. *Hays & New*, for defendant and appellant.

HOWE, J. The plaintiff, as assignee of N. C. Folger, brought this action to recover an iron safe alleged to belong to him, and to be in possession of defendant in his dwelling house, and to be there illegally detained by the latter.

The defendant averred that the object of the suit was, more properly speaking, a vault, attached to the walls of his dwelling with brick and mortar, and therefore immovable.

There was judgment for plaintiff for the safe or its value, and the defendant appealed.

The defendant purchased the dwelling house here mentioned from R. H. Bayley, who had purchased it at sheriff's sale under a writ of *feri facias* against N. C. Folger, the plaintiff's assignor. The sheriff's deed to Bayley makes mention of a "safe in the wall."

There seems to have been some difficulty made by N. C. Folger about

*Folger v. Kenner.*

surrendering the premises after this forced sale, which was finally settled by a compromise between him and the defendant Kenner who, in the meantime, had purchased from Bayley. In the act of compromise Folger reserves a right to sue for the safe; but Kenner does not in any way give up his right to retain it as part of the immovable property of which he had become owner.

The compromise does not appear to affect this case in any manner. The question is one of fact merely whether the object of the suit is a movable safe or a vault attached to and a part of the immovable.

The evidence satisfies us that it is a double brick vault, lined with iron, and with double iron doors, and is not only attached with plaster or mortar to the walls of the house, but is attached in the same way to the soil by a brick foundation, running down through the floor of the house. The iron doors and livings could not be taken away without also removing the double brick vault which incloses them, and this in turn could not be removed without breaking the building to some extent.

The whole affair might almost be considered an immovable by nature, having its foundation in the soil itself. Rev. C. C. 464. But it is at least immovable by destination under Rev. C. C. 468, 469, and the plaintiff has no more right to remove it than he has to remove a mantlepiece from the drawing-room. 5 An. 717; 6 An. 264; 23 An. 137.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment for defendant, with costs.

No. 2795.—*MRS. L. L. MANN v. B. L. MANN.*

An written agreement between the husband and the wife, who have been divorced at a suit of the wife on the ground of the adultery of the husband, which makes provision for the settlement and partition of the community property, is a law between the parties, and a judgment of the District Court which carries into effect and renders executory the provisions of the written contract will not be disturbed on appeal.

**A**PPPEAL from the Sixth Judicial District Court, parish of Tangipahoa. *Ellis, J. T. & J. Ellis and R. & H. Marr*, for plaintiff and appellee. *Race, Foster & E. T. Merrick*, for defendant and appellant.

**TALIAFERRO, J.** In May, 1869, Mrs. Mann, then the wife of the defendant, brought suit for a divorce on the ground of the husband's adultery. Pending the suit which involved the liquidation and settlement of the community, the parties having the vain hope of evading the scandal of such a proceeding, entered into an agreement to submit the main action upon the pleadings and evidence, it being a foregone conclusion that judgment of divorce would be rendered. In regard to the community property the parties, by a written agreement drawn up by their counsel, provided for the consequences of the expected judg-

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Mrs. L. L. Mann v. B. L. Mann.

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ment, which was in due time rendered. Provision was made for alimony, the care of the children, the payment of some pressing debts, and finally for the liquidation and settlement of the community and its division between the plaintiff and defendant. It was settled that this should take place on the first of January, 1870. The plaintiff in the present suit complains that the defendant refuses to comply with his engagement, and seeks, by a course of false and treacherous conduct, to avoid a division of the common property as he obligated himself to do. The plaintiff therefore took a rule upon the defendant to compel him to a compliance with the written contract. The answer to the rule appears to justify the allegation of the plaintiff charging the defendant with evasion and dissimulation. Judgment was rendered in the court below in favor of the plaintiff. It decreed a partition of the community, that to that end the personal effects be sold for cash after legal advertisements; that the real estate be divided in kind if practicable; if not, that it be sold on such terms as the parties may agree upon. In case they should not agree, that it be sold for cash at auction, after legal notice, provided the appraised value be bid, otherwise on a credit of twelve months for notes secured by mortgage, etc. The judgment, after directing the manner of making the partition, referred the parties to a notary with instructions to him in regard to ulterior proceedings. From this judgment the defendant appealed. The written contract of the parties is the law of the case. The fourth clause of this instrument is in these words: "The real estate and personal effects of the community shall remain undisposed of until the first of January, A. D. 1870, when the personal effects shall be sold for cash, and the real estate shall be divided in kind, or sold to effect a division upon such terms as may be agreed upon by the parties, without the intervention of the court."

The fifth clause of the written act recites: "That the entire community, including the interest thereof in the firm of B. L. Mann & Co., shall be liquidated and settled up as soon as can be with due regard to the interests of all parties. After all the debts and liabilities of the community have been settled and paid, the net proceeds of the community shall be equally divided between the parties, plaintiff and defendant."

A bill of exceptions appears in the record, taken by the defendant's counsel, to the admission of a portion of the evidence of Ellis, one of the counsel who, on the part of the plaintiff, was engaged in drawing up the written agreement between the parties. In regard to the settlement and partition, Ellis testified that it was clearly understood by the parties that the partition agreed upon did not contemplate the community interest in the firm of B. L. Mann & Co. This evidence was objected to by the defendant's counsel, on the ground that there is no

Mrs. L. L. Mann v. B. L. Mann.

ambiguity in the language of the act, and therefore there is no room for evidence *abundante* to explain it. It is unnecessary to determine this objection, for we believe there is no ambiguity in these clauses of the written contract. Taken in connection with all that precedes them it is sufficiently clear that the purpose of the parties, as learned from the act itself was, on the first of January, 1870, a settlement and partition of the community, *exclusive* of the community's interest in the commercial firm. The first clause is significant. It provides that a number of debts of the community which are enumerated shall be paid in equal portions by the parties if, after efforts being made for that purpose, an extension of time can not be obtained to make the payment. This was a preparatory step to the partition of the community. The partnership had no interest in these debts. No provision was stipulated in regard to the liabilities, if any, of the community in reference to the partnership engagements, and no stipulation that the partnership affairs should in any manner affect the agreement to make a division of the community on the first of January. The pretensions of the defendant now set up, that at some time hereafter the community may become responsible on account of the partnership, are flimsy and entitled to no consideration. His efforts to make out his firm insolvent now is a signal failure. No creditor of the partnership is on the alert, or concerned about a division of the community between the plaintiff and defendant in this suit. The interpretation of the written instrument, contended for on the part of the defendant, would protract the settlement and partition—*ad græcas calendas*. No such interpretation can be admitted, for it would be in violation of right and common sense.

It becomes unnecessary to examine the plaintiff's bill of exceptions.

The judgment of the lower court we consider correct.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed, with costs in both courts.

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No. 2742.—ISIDORE LEVY v. A. FRIEDLANDER.

A dry goods merchant who has engaged the services of a clerk to aid in carrying on his business is not liable to an action in damages by his clerk for simply taking a partner in the business, nor is he liable to such action because he has changed somewhat the character of his business from that of a wholesale notion store to that of a wholesale dry goods store. A clerk who has quit his employer under such circumstances without showing any good cause therefor can recover neither wages nor damages.

**A** PPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Saucier & Michinard*, for plaintiff and appellee. *Cooley and Phillips*, for defendant and appellant.

**Howe, J.** The plaintiff alleged that about the twenty-ninth of June, 1869, the defendant employed him and secured his services as managing clerk and salesman in a "wholesale fancy goods and notions

store, which said Friedlander stipulated and agreed to open and carry on alone and in his own individual name in the building forming the southwest corner of Chartres and Customhouse streets, in this city;" that he was employed for the month of July at \$166 66, and for the year, commencing August 1, at \$3000 per annum, payable monthly; that for several years prior to this time he had been, to the knowledge of the defendant, employed as a clerk in the "wholesale fancy goods and notions" business, and would not have engaged his services in any other business; that he would not have contracted with defendant but for the representation by the latter that he would have no partner, and that in the event of success plaintiff might become interested with him; that said Friedlander refuses to fulfill his part of said contract, but has formed a business connection with a "wholesale dry goods house" in this city, and has abandoned his intended and proposed business in "wholesale fancy goods and notions." He alleges default on demand, and prays judgment for the amount of the salary due and as it shall fall due, less a credit of \$50 paid.

The answer was a general denial, and an averment that "the respondent employed the plaintiff as a clerk in a house which he contemplated opening in this city, but that on opening said house or store plaintiff positively refused to comply with his contract or enter upon the discharge of the duties required of him by said contract without any just cause, but assigned frivolous and unfounded reasons for not doing so.

There was judgment for plaintiff as prayed for, and the defendant has appealed.

The main facts appear to be that in June, 1869, the defendant intended to establish himself in business, and employed the plaintiff as a clerk at the rates set forth above. The plaintiff was set to work to prepare the store on the southwest corner of Chartres and Customhouse streets for the reception of a stock of goods, and the defendant went on to New York to purchase a stock. While in New York the defendant modified his plans somewhat, and concluded to take a partner and to carry on a business at a store on the opposite side of Chartres street and sell at wholesale not only "fancy goods" and "notions" but "dry goods." The plaintiff thereupon refused to work for him, giving as a reason that he did not know the dry goods business and did not like the defendant's house, and he was therefore discharged. This was about August, 1869. In October, 1869, the plaintiff returned to the employment of the firm where he had been when the defendant engaged him, and at the same salary he had there received—\$2000 per annum—and his work was that of a *general* salesman, the business of his employers being to sell at wholesale "*dry goods, fancy goods and notions.*"

We must confess our inability to perceive in these facts any foundation for the judgment appealed from.

It will hardly be contended that a merchant who has employed a clerk with the expectation of opening a store on the southwest corner of a street has not the right to open it on the northeast corner and there require the services of his employe; or that such a change of plan will subject him to an action of damages or to the penalty of article 2749 of the Rev. C. C.

Nor do we think it can be contended with much more force that a merchant who employs a clerk with the expectation of carrying on business alone, precludes himself from the legal right to take a partner, or that such a change of plan will subject him to an action for damages or to the penalty of the article.

If the new partner were a person of infamous character, or should treat the clerk unjustly, the rights of the clerk might be changed, but there is no allegation or proof in this case of any such state of things.

There is nothing left in this record, then, on which to base the plaintiff's claim, except the theory that the defendant changed his business in such a way that the plaintiff properly refused to work for him, and his discharge was therefore unlawful under article 2749 of Rev. C. C. Admitting for the sake of argument that a complete change of business, as from that of grocer to that of gunsmith, would justify this position, we do not find any such state of facts in this case. A witness of experience states that the dry goods business and the notions business are the same thing; "that is," he says, "dry goods houses usually keep notions—some more and some less."

It appears also by the testimony of another disinterested witness that the defendant's house was of this kind, keeping a stock of "notions" and "fancy goods" as well as "dry goods," strictly so called. Mr. Worcester defines dry goods as "textile fabrics, such as are sold by linen drapers, mercers, etc., in distinction from groceries."

It also appears by plaintiff's own testimony, as stated above, that after his discharge by defendant he returned to his former employers, and took a place as general salesman in a business identical with defendant's, namely, dry goods, fancy goods and notions. We conclude that the reasons given by plaintiff for refusing to work for defendant's house were frivolous, and that he was properly discharged. Rev. C. C. 2750.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of defendant, with costs in both courts.

Rehearing refused.

## No. 2792.—MARGARET HAUGHERY v. H. R. THIBERGE et als.

If the main action is sufficient in amount to give the appellate court jurisdiction of the appeal, then other parties to the suit are entitled to the benefits of the appeal without regard to the amount involved.

An appeal is valid if it be taken by motion in open court, and the bond be given in favor of the clerk. Such appeal will not be held irregular because the party afterward so considered it, and to take another appeal by petition where all the parties were not cited.

A clause in a building contract imposing a penalty of thirty dollars per day upon the builder for failing to complete the building within the time specified can not be enforced against him if the fault for not completing it within the time lies with the other contracting party.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. T. & J. A. Gilmore*, for plaintiff and appellee. *T. S. McCay* and *Roselius & Phillips*, for defendants and appellants.

HOWE, J. A motion has been made to dismiss the two appeals taken herein, the one by Lee, Markey, Carré & Co. and Powers & Dunn, and the other by Charles Donnelly, on various grounds, which are reducible, however to two, viz.:

*First*—That the amount involved does not exceed \$500; and

*Second*—That all the parties to the judgment have not been made parties to the appeal.

The amount involved in the case, as between the plaintiff and Thiberge, exceeds two thousand dollars. The appellants were made parties defendant for the purpose of settling their claims upon the fund due from plaintiff to Thiberge; and although the claims of some are less than five hundred dollars, yet we think they are all entitled to appeal, being parties to a dispute in which an appealable amount is at stake.

As to the question of parties, the appeal of Donnelly is valid, having been taken by motion in open court with a bond in favor of the clerk. The fact that he deemed this method irregular, and afterward took an appeal by petition and failed to have all parties cited, can not prejudice him, for the motion of appeal was correctly made, and his rights can not be destroyed by his want of faith in their existence.

As to the appeal taken by Lee and others, it appears that some parties have not been cited; but we are not disposed under the facts of the case to attribute the blame to the appellants. They prayed for citation in such form as to make it the duty of the clerk to attend to the matter. The motion to dismiss is overruled, and

It is ordered that the appellants Lee and others have until the first Monday of November, 1870, to cause the proper parties to be cited.

HOWELL, J. This is an action by a proprietor, under a building contract, against the contractor, his surety and several unpaid sub-contractors and furnishers of materials, etc., to settle the rights of the

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24	442
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Margaret Haughery v. Thiberge et al.

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various parties to the unpaid portion of the price fixed by the building contract. The plaintiff claimed the enforcement of a penal clause for failure to complete the work within the stipulated time, and the cost of completing the building according to the specifications after it was abandoned by the contractor. From a judgment in favor of the plaintiff, five of the creditors of the contractor, whose claims amount to \$2918 12, have appealed.

The only error we discover in the judgment is in allowing the penalty of thirty dollars per day for the delay in completing the contract, and the erasure of the privilege to the prejudice of the appellants for their proportion of the unpaid installment of the price, \$3857 50.

The evidence satisfies us that the delay resulted principally from the tardiness of the plaintiff in having the party wall, which was unfit for use, rebuilt in time for the contractor to complete his work. This old party wall was, by the terms of the contract, to be used in constructing the new building without cost to the contractor, and when the old building was torn down the said wall was found unsafe and unfit, was condemned by the proper city authorities, and the contractor was forbidden to use it. The plaintiff was duly notified, but this wall was not rebuilt until it was too late for the erection of the plaintiff's building within the time. This was a "lawful excuse" for the non-performance of the principal obligation within the stipulated time. R. C. C. 2120, 2122. It is the first and not the second clause of the latter article that is applicable to this case. The contract was to build the house by a certain day, and if it was not then built the contractor was to pay thirty dollars per day until it was completed. But the plaintiff contributed mostly, if not entirely, to this delay, and she is not in a position to enforce the penal clause.

The judgment seems to be final as to the contractor and those of his creditors under the contract who have not appealed, and the amount, \$1915 45, remaining in the proprietor's hands out of the unpaid installment after completing the building, not being enough to satisfy the whole of the claims of the appellants, must be distributed ratably among them. The allowance of interest on the distribution will not change the amount to be received, and is therefore omitted in the calculation.

The appellants are not, under the evidence, entitled to judgment against the plaintiff for the whole amount of their respective claims. But as they ask it against the defendant Thiberge, the contractor, it will be allowed to avoid a multiplicity of actions.

It is therefore ordered that the judgment appealed from be reversed, as to the appellants herein only, and it is now ordered that the plaintiff Margaret Haughery be condemned to pay to the

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Margaret Haughery v. Thiberge et als.

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said appellants the sum of \$1915 45 out of the fifth and last installment due under her contract of sixth August, 1868, with the defendant H. R. Thiberge, in the following proportions, to wit: To J. G. Lee \$648 60, to P. Markey \$364, to W. W. Carré & Co. \$320 80, to Powers & Dunn \$98 05, and to C. Donnelly \$484, and that the privilege on the lot and building of plaintiff, described in the petition, in favor of each of said parties, be recognized and enforced. And it is further ordered that the said J. G. Lee recover of the said H. R. Thiberge the sum of \$991 35 with legal interest from January 12, 1869; that the said P. Markey recover of the said H. R. Thiberge the sum of \$556 55, with legal interest from February 12, 1869; that the said W. W. Carré & Co. recover of the said H. R. Thiberge the sum of \$490 48, with legal interest from December 24, 1868; that the said Powers & Dunn recover of the said H. R. Thiberge the sum of \$150, with legal interest from December 27, 1868, and that the said C. Donnelly recover of the said H. R. Thiberge the sum of \$739 74, with legal interest from December 16, 1868—each of said sums to be credited with the amounts severally allowed to them by this judgment out of the funds in the hands of the plaintiff Margaret Haughery, when paid; the costs of the said appellants in the lower court, as well as the costs of appeal, to be paid by the said Margaret Haughery and H. R. Thiberge.

It is finally ordered that in other respects the judgment appealed from remain undisturbed.

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No. 2780.—JESSE R. POWELL v. JENKINS & WALKER—BROOKS, McDONALD & Co., Intervenor.

In conducting a case before the district court the judge is necessarily invested with a large discretion in the matter of granting a continuance, and if the appellant fails to advise the appellate court by bills of exceptions of the errors of the judge in refusing a continuance, then and in such case the Supreme Court will maintain the ruling of the judge *a quo* refusing it.

**A**PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. T. O. Starke* and *Alfred Grima*, for plaintiff and appellee. *Samuel B. & C. L. Walker*, for intervenors and appellants.

LUDELING, C. J. The plaintiff attached twenty-one bales of cotton as the property of Jenkins & Walker, residents of the State of Arkansas.

Brooks, McDonald & Co. intervened, and claimed that the cotton belonged to them.

There was judgment in favor of the plaintiff against the defendants and the intervenors, and the latter alone have appealed.

The only question for decision on appeal on the merits is whether or not the property attached belonged to the intervenors.

If we disregard the objections urged against the admissibility of the evidence of the intervenors and give full effect to it, the evidence fails to prove that the cotton belonged to the intervenors, and therefore the judgment should be affirmed.

The intervenors made an affidavit for a continuance of the case in the court *a qua*, on the ground that one of the intervenors, Hugh McDonald, was a material witness on their behalf; that he had been duly summoned, but that he could not be found on the day of trial, and that he was absent from the State.

The motion for continuance was refused, and no bill of exceptions was taken to the ruling of the court; and we are unable to say what were the reasons for the ruling. Much reliance must be placed on the discretion of the lower courts, which have better means than the Supreme Court to ascertain the object of applying for a continuance.

We are not satisfied that the judge erred in refusing a continuance, on the grounds of the absence of one of the intervenors.

It is therefore ordered and adjudged that the judgment of the district court be affirmed, with costs of appeal.

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No. 2770.—FRANCOIS LACROIX AND ETIENNE CORDEVOLLE v. EDWARD D. WHITE.

A possessor of real estate under a title derived from a judicial sale, made under a judgment, can not be evicted therefrom in a suit by another claimant by a different title, unless the claimant alleges and shows that the judgment itself is illegal, or that the sale is illegal and void.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. M. E. Livaudais and John J. Barnett*, for plaintiffs and appellants. *Fellows & Mills*, for defendant and appellee.

**LUDELING, C. J.** The plaintiff brings this action to recover a certain lot of ground in the city of New Orleans, which he alleges defendant has illegally taken possession of.

The defendant avers that he is the owner thereof by virtue of a purchase at a sheriff's sale, under a judgment of a court of competent jurisdiction. There was a judgment of non-suit and the plaintiff has appealed.

The plaintiff is really seeking to attack a judgment and a sale under it without having alleged in his pleadings any irregularity or illegality, either before or after the judgment. This can not be done. The defendant's title will be upheld until its defects (if any there be) be specifically stated and proved.

It is therefore ordered that the judgment appealed from be affirmed, with costs of appeal.

No. 2343.—NELSON CLEMENTS, HORACE CONE subrogated, v. O. B. GRAHAM & Co.

The courts of Louisiana will not entertain a suit founded upon a claim alleged to have been acquired in consideration of army stores furnished to the enemies of the United States during the late civil war.

**A**PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Semmes & Mott*, for plaintiffs and appellants. *Bradford, Lea & Finney*, for defendants and appellees.

TALIAFERRO, J. The plaintiff sues the commercial firm of O. B. Graham & Co. for \$45,000, the value, as he alleges, of a lot of cotton belonging to him, which the defendants, by one of their firm, became possessed of by illegal means, having acquired it in Mexico from persons illegally and fraudulently holding it under a purchase from certain parties who, by violence and unlawful means, had taken it from the plaintiff. The plaintiff charges fraud and bad faith in the defendants in getting hold of this cotton, they being fully cognizant of all the illegal proceedings of the persons through whom they pretend to have acquired the cotton. There was judgment against the plaintiff in the court below and he has appealed.

It seems that this plaintiff, who was a citizen of New York, entered into a contract in 1862 with the insurgent States to furnish them with what he called "army stores," by which we understand arms and munitions of war generally, to be used in promoting the rebellion against the United States, then rife throughout those States. That these army stores were to be delivered at some points in Texas, designated by the contracting parties. That in consideration for these army stores the plaintiff was to receive cotton at some specified price per pound. It is for the value of the cotton, or a part of it, so received, as he alleges, in payment for the army stores delivered by him, that the plaintiff is now contending.

Will the courts of this country, either State or national, entertain a suit founded upon a claim alleged to have been acquired in consideration of army stores furnished during the late rebellion to the enemies of the United States engaged in active war against the government and striving to subvert it? We think not. It would be inconsistent with the dignity, as well as opposed to the public policy, of the United States, to recognize such an ownership as that upon which the plaintiff founds this action. In 14 Howard, p. 38, the Supreme Court of the United States declared that "no contracts can be enforced in the courts of the United States, no matter where made or where to be executed, if it is in violation of the laws of the United States, or is in contravention of the public policy of the government or in conflict with subsisting treaties." We think the judgment of the lower court should be sustained.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed with costs.

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WYLY, J., *concurring*. The evidence satisfies me that Clements never had actual or corporeal possession of the cotton. It was sent by the confederate authorities from San Antonio on wagons employed in confederate service, with bills of lading addressed to Major Baughn, confederate cotton agent at Rio Grande City, and from there it was to be forwarded to Wm. W. Perkins, confederate agent at Matamoras, to whom also bills of lading were forwarded from San Antonio. The cotton was sent from the interior of Texas doubtless for the purpose of meeting the engagements of the confederate government with Clements, and it was designed that these agents, to whom the bills of lading were forwarded, should make the delivery at the mouth of the Rio Grande, pursuant to contract, and that the debt of the confederate government to Clements for army supplies was to be credited with the proceeds of the cotton at the price per pound stipulated in the contract. Being apprehensive that the cotton might not reach its destination, in view of the impending fall of the confederacy, and preferring to take the title of the cotton in himself while it was in transitu from San Antonio to Rio Grande City, Clements entered into a contract with Perkins, at Matamoras, for the cotton, and the bills of lading were indorsed and delivered by Perkins, agent for the confederate government, to Clements. This was in May, 1865. It was doubtless a sale and constructive delivery of the cotton, the drivers of the wagons becoming the bailees of Clements.

But it is shown that at the time of the contract between Clements and Perkins the former was a citizen of New York, a loyal State, and the latter was an inhabitant of an insurrectionary district; besides, he dealt only with Clements in behalf of the rebel government and as its agent.

Under the act of Congress commonly called the non-intercourse act, the parties were incapable of making a conventional obligation.

The contract of May, 1865, did not, therefore, transfer either the title or the possession to Clements. It was an absolute nullity.

The constructive delivery resulting from the transfer of the bills of lading and the sale of the cotton while it was *in transitu*, gave no possession, because the whole contract was totally void on account of the incapacity of the parties.

Clements could not appoint as his agents the wagon drivers having the cotton in charge while it was being hauled from San Antonio to Rio Grande City, because of the same impediment which prevented him from making a valid contract with Perkins. These drivers lived

in rebel lines, and they were employed in the service of the enemies of the United States.

The lawless persons who took the cotton, compelled the agent of the rebel government at Rio Grande City to give them the bills of lading before the cotton arrived. When it arrived on the wagons they took it from the drivers forcibly and crossed it into Mexico. The actual or corporeal possession of the cotton, therefore, never passed out of the rebel government or its agents and employes, the carriers, until it was taken by the robbers and crossed into Mexico and sold. It was yet in the actual custody of the rebel government, or its agents, when the robbery was committed.

Now, the plaintiff has no cause of action against the defendants, because their agent bought part of the cotton from the robbers in Mexico, knowing of the robbery, unless he had both ownership and possession thereof. He had neither, as we have just seen, because both his title and constructive possession resulted alone from the contract of May, 1865, with Perkins, at Matamoros, and that entire contract was absolutely void, because of the incapacity of the parties to make it, and because of the immorality thereof. The fact of possession outside of that void contract is not shown by the evidence. The plaintiff never got the fruits of that contract, because he never was able to get the actual possession or custody of the cotton, the object thereof. Owing to the character of the contract of May, 1865, the plaintiff can not get the aid of the court to enforce his rights resulting therefrom, the policy of the law being to give no remedy to an immoral contract. I therefore concur in the decision of this case.

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HOWE, J. I concur in the decree in this case. I do not think the plaintiff has established such possession as to entitle him to maintain his action, his contract with the insurgents being confessedly flagitious.

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LUDELING, C. J., *dissenting*. In my opinion the question involved in this case is, whether or not a person who has acquired possession of property through a contract entered into against public policy, or in violation of law, can be deprived of this property by robbers, who take it and sell it to others who are aware of the nature of the robbers' possession. Or, to state the question in another form, whether the title to personal property, under an executed contract, can be questioned, on the ground of the illegality of said contract, by one who holds under a transfer from robbers with knowledge of the theft? I think the question should be answered in the negative. 2 Wallace 81, Brooks v. Martin; 17 How. 232, Blair v. Gibbs.

As against a mere trespasser, a perfect title is not necessary to recover in a petitory action.

The mere possession of the cotton in this case would be sufficient to authorize its recovery from the robbers or those who acquired from them with knowledge. 8 Cranch 421; 7 Wallace 573—Morris' case.

The evidence satisfies me fully that the contract between Clements and the confederate States, whereby he acquired the cotton in controversy, was an executed contract. He had delivered the army supplies to the agents of the confederate States, for which Colonel W. H. Broadwell, chief of the cotton bureau, under instructions from headquarters, directed certain cotton to be delivered to Clements or his agents. He says: "I arranged with Governor Morehead to *deliver* to him some cotton at Waco or thereabouts. My understanding was that the cotton would be at the risk of Governor Morehead or his principal, *after delivery at Waco or thereabouts*. My recollection is that Governor Morehead was willing to take the cotton in almost any manner that would place the cotton in *his possession or under his control*. My order for the cotton contemplated that the cotton would be pointed out by the officer to whom it was addressed, and *placed at the disposal of Governor Morehead*, or any one authorized by him to receive it," etc. The letter of instructions written by Colonel Broadwell to the officer at Waco corroborates Broadwell's testimony, and it contained the further direction: "The indebtedness of the government, for the settlement of which the cotton is to be applied, will appear in the shape of a copy from Wm. M. Perkins. This certified account Major Tevis will take up by using cotton at thirty cents per pound, less the expense of transporting and placing it on shipboard at Matamoros. Should any difficulty occur in adjusting this, the cotton can be used at thirty cents in your district, and an additional quantity can be given to pay the expenses of transportation and placing it on shipboard."

The evidence shows that quantities of cotton were collected together at Waco and San Antonio for Clements; that the bales of cotton were weighed and marked in his mark, and shipped for his account. The bills of lading stated that the cotton was consigned to Wm. M. Perkins for account of Nelson Clements. And Wm. M. Perkins and his clerk swear positively that, shortly before the capture of the cotton by Benavides and Slaughter, Nelson Clements and Wm. M. Perkins had a settlement in regard to the very cotton claimed in this suit. Wm. H. Campbell, the clerk of Wm. M. Perkins, says: "I can't say what became of the bills of lading in the hands of the carrier, and those kept at San Antonio; but those *in possession of Perkins were given to Clements*, who, in his settlement with Perkins, agreed to take the bills of lading weight as expressed in them, and so settled with Perkins, when he turned over the money vouchers and assumed pos-

session of the property." This is fully corroborated by Wm. W. Perkins. So does Clements himself swear positively to the same facts. Merriman swears that the carriers afterwards applied to him, as the agent of Clements, for payment for transportation of the cotton, under an agreement with Clements. The indorsement or delivery of the bills of lading gave an irrevocable right to receive and control the cotton, if delivery had not been perfected before. 6 East. 41, Abbott on Shipping (7th Shee's edition) p. 326; 1 An. 84; 15 An. 438; 18 An. 84.

I think that defendants can not invoke the statutes of the United States, interdicting commerce between citizens of the belligerents during the late war, to maintain their wrongful possession. 10 Wallace 464, Corbett v. Nutt; 8 Cranch. 421; 7 Wallace 573—Morris' case.

I can not concur in the views of my associates in this case.

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No. 2754. — JOHN FREELAND v. W. HYLLESTED & Co. — GEO. H. VINTEN, Third Opponent.

A lessor who has consented to a sub-lease by the lessee can not afterward hold the sub-tenant liable as a third person, and claim a lien and privilege on his property found on the premises to secure the rent due or to become due by the lessee.

**A**PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. C. M. Conrad & Son*, for plaintiff and appellant. *John McKee and Race, Foster & E. T. Merrick*, for opponent, appellee.

LUDELING, C. J. This is an action to recover rents not due, from Hyllested & Co., on the ground that said firm was in failing circumstances and insolvent. He obtained a writ of provisional seizure, whereby the property of Hyllested & Co. as well as that of the sub-lessees was seized.

Geo. H. Vinten intervened to claim his property. He alleged that he had punctually paid his rents and that his property was not liable to seizure for the payment of the rents due by Hyllested & Co.

There was judgment for the amount admitted to be due by the sub-tenant Vinten in favor of the plaintiff, who has appealed. He claims the whole amount for which the property was rented to Hyllested & Co., and claims a privilege and right of pledge upon the property of Vinten, who is treated as a third person and not a sub-tenant. The appellee has not prayed for any change in the judgment. The only question for decision is, was or was not Vinten a sub-tenant?

The plaintiff insists that, because in the act of lease between himself and Hyllested & Co., there was a stipulation that Hyllested & Co. should not sub-let the property without the written consent of the lessor, and this written consent was never obtained, the sub-lease is a nullity and Vinten was not a sub-tenant, but a third person who



had voluntarily put his property on the premises leased. It is proved that the date of lease between the plaintiff and defendant, was not recorded, and that Vinten did not know that the stipulation above stated was in the contract of lease. It is also proved that the plaintiff knew Vinten had sub-leased the upper stories of the building, and that just before the seizure in this case the son and agent of plaintiff wrote a letter to Mr. Vinten, the purport of which is as follows:

"My father is the owner of the property, and as his agent would suggest to you the propriety of holding your rent subject to my order. Mr. Hyllested has been protested.

"Very respectfully, etc.,

"JOHN D. FREELAND, Agent."

It is singular that after this the plaintiff should pretend that Vinten is not a sub-tenant. His contract of lease from Hyllested & Co. is proved; and whether Hyllested & Co. violated their contract with the proprietor of the property is immaterial in the inquiry as to the status of Vinten. The law permits the lessor to sub-let to another. This contract depends entirely upon the consent of the parties to it. It can not effect, however, the rights or obligations of the original lessor and lessee. The two contracts are totally independent of each other. If the lessee has violated his obligation, that can not of itself change the fact that Vinten occupied a part of the premises as a sub-tenant, under a contract with the lessee.

It is therefore ordered that the judgment be affirmed, with costs of appeal.

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No. 2797.—*HEIRS OF G. P. McMICHAEL v. MRS. F. BANKSTON, Widow,*  
etc., et als.

The fact that words appear in an olographic will which are not in the handwriting of the testator is not good cause for annulling the will, if the words themselves do not change the meaning nor alter the dispositions made by the testator in his own handwriting.

**A** PPEAL from the Parish Court, parish of Tangipahoa. *O. J. Bradley*, Parish Judge. *W. Duncan*, for plaintiffs and appellants. *T. & J. Ellis*, for defendant and appellee.

**HOWELL, J.** The plaintiffs, who are heirs of G. P. McMichael, deceased, sue to annul the olographic will of their father on the ground that it was not wholly written by him.

The four plaintiffs as witnesses state that the will was entirely written, dated and signed by the hand of the testator, except the word "to" in the sixth line from the top, and the word "acres" in the eighth line, which are in a different hand. Another witness and two experts express the same opinion. The original will is before us, and it is evident that there is some difference in the appearance of those

two words from the balance of the writing. But it is very manifest that the presence or absence of the two words can have no material effect upon the meaning or contents of the will. Without them the sense is the same as with them—the whole will showing that the testator bequeathed to his wife a certain number of *acres* of land. In another place there is a connected and rational repetition of this bequest in which the same two words are written by the testator.

Admitting, therefore, that the two words in question were added by the hand of another, we may safely, under the first clause of article 1589 R. C. C., consider them as not written, and not impair the validity or effect of the will.

We can not say that the law requires a will to be annulled for so unimportant and trivial cause.

This is not a case in which damages for a frivolous appeal are authorized.

Judgment affirmed.

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119 279

#### NO. 3895.—MRS. L. H. S. CANNON v. THE FEMALE ORPHAN SOCIETY.

A purchaser of real property can not maintain an action to annul the sale on the ground that his vendor's title is affected with a relative nullity.

The uninterrupted possession of real estate for thirty years vests an absolute title in the possessor without the possession being in good faith.

**A**PPPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Lea, Finney & Miller*, for plaintiff and appellee. *A. J. Lewis*, for defendant and appellant.

HOWELL, J. On the tenth of June, 1867, the defendant sold to the plaintiff a piece of real estate for ten thousand dollars, one-third cash, paid at the date of the act, and the residue in two notes for equal amounts, payable one and two years after date, and secured by mortgage and the vendor's privilege on the property sold. The plaintiff took possession of the property and paid the first note at maturity; but refusing to pay the last, the defendant obtained an order of seizure and sale, the execution of which the plaintiff enjoined and sued to annul the sale, on the grounds that the donation *inter vivos* of the property made by Julien Poydras to the defendant on the fourteenth April, 1817, is in terms and legal effect a substitution, and utterly null and void, or if any title whatever passed thereby, it was by the express terms of the act inalienable and subject to the reversionary right of the Charity Hospital. She also set up defects in the executory proceedings.

The defense is a general denial and the prescription of ten and thirty years.

The district judge annulled the sale, canceled the unpaid note and ordered the defendant to refund the sums paid, with interest and costs, and the defendant appealed.

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Mrs. L. H. S. Cannon v. The Female Orphan Society.

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It is urged on the part of the defense, and we think properly, that a purchaser in the undisturbed possession and enjoyment of property which has been sold to him, can maintain no action to annul the sale on the ground that his vendor's title is defective or is affected with a relative nullity, as at most the one in question can be considered. If the purchaser has just reason to fear being disquieted, he may retain the price until the vendor gives him security. R. C. C. 2557; 7 N. S. 96; 14 L. 470; 6 R. 471. The plaintiff sets forth no such reason and made no such demand.

We think, too, the plea of prescription is well made. The ownership of immovables is prescribed for by thirty years without any need of title or possession in good faith, if the possession as owner has been continuous and uninterrupted during all the time. R. C. C. 3499, 3500; McLean v. Guillaum, 24 An. We find from the evidence that the defendant acquired this property in 1817 by a title which divested the ownership of the donor and vested it in the donee, even though it may have been borrowed, and sold it in 1867, a period of fifty years. This suit was instituted in 1871, and there is no intimation that there has been any disturbance of possession or title by any one having an alleged contingent or reversionary right. It is unnecessary, in our opinion, to notice any other points. The alleged defects of form in the proceedings are not such as to authorize the injunction. C. P. 734, 735; 21 An. 692; 23 An. 83; C. P. 737; 18 An. 657; R. S. sec. 1202; 19 An. 80.

It is therefore ordered that the judgment appealed from be reversed and that there be judgment in favor of defendant dissolving the injunction herein, with ten per cent. on the amount enjoined as damages, and costs in both courts.

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**No. 3672.—SUCCESSION OF ANTOINE TRUXILLO—SOSTHENE TRUXILLO v. JEANNETTE TRUXILLO, wife of Antoine Dalferes et al.**

The parish court is without jurisdiction to entertain an action to enforce a mortgage claim against a succession where the amount involved is above five hundred dollars.

Real estate belonging to a succession can not be sold under judicial process without dividing it into lots varying from ten to fifty acres. Constitution, article 132; Revised Statutes of 1870, sec. 2452.

**A**PPPEAL from Parish Court, parish of Assumption. *D. LeBlanc*, Parish Judge. *Hiram H. Carver*, for plaintiff. *Nichols & Folse*, for opponent and appellants.

**WYLY, J.** In September, 1871, Antoine Truxillo died, leaving a small succession, consisting mainly of a tract of land, and leaving three heirs, viz: Sosthene Truxillo and his two sisters, Mrs. Dalferes and Mrs. Barras.

Pending the application of Mrs. Dalferes to be appointed administratrix, the plaintiff Sosthene Truxillo sued his two sisters for a partition of the succession, and alleging that he is a mortgage creditor of said succession for \$7282; he prayed that the land be sold in block by an auctioneer for cash enough to satisfy his mortgage claim, "and also for cash for one-third of the balance remaining beyond the amount at the day of sale of said mortgage claim;" and that a notary be appointed to whom the parties may be referred for final partition, etc.

The court ordered all the property to be sold in block for cash "for the double purpose of paying" the mortgage claim held by the plaintiff and for partition.

From this judgment the defendant Mrs. Dalferes appeals. She contends:

*First*—That the parish court was without jurisdiction to render the judgment ordering the sale of the property to pay the mortgage claim set up by the plaintiff, because it is contested by the co-heirs and the amount thereof exceeds \$500.

*Second*—That the action to enforce this mortgage claim as an incident to his suit for partition is illegal.

*Third*—That the order of the parish court requiring the sale of the property in block violates article 132 of the Constitution requiring land to be sold in lots from ten to fifty acres.

This proceeding is anomalous. The main object of the plaintiff is doubtless to enforce his mortgage claim against the succession of his father, which is unrepresented, and which claim will absorb the greater part of the succession. He opposes an administration, and yet, under articles 990 and 992, Code of Practice, he seeks to have the property sold to pay his large claim by cumulating the application with an action for partition.

The property of a succession can not be sold under the articles referred to until some one has been appointed to represent it, and until the claim has been allowed by the administrator or other legal representative, or adjudicated upon by the court.

The amount of this claim being \$7282, the parish court was without jurisdiction.

The jurisdiction of the court depends upon the amount in dispute, regardless of the party holding the claim, whether he be an heir or not.

As Truxillo died in September, 1871, the property of his succession must be sold in lots of from ten to fifty acres each. It can not be sold in block. Revised Statutes of 1870, section 3452; Constitution, article 132.

It is therefore ordered that the judgment appealed from be annulled, and that this suit be dismissed, with costs of both courts.

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

AT

MONROE.

JULY, 1872.

JUDGES OF THE COURT:

HON. JOHN T. LUDELING, *Chief Justice.*

HON. J. G. TALIAFERRO,

HON. R. K. HOWELL,

HON. W. G. WYLY,

HON. W. W. HOWE,

} *Associate Justices.*

No. 365.—HAMILTON & CO. v. J. C. ELSTNER.

The keeping of a warehouse floating on the water is an employment requiring skill, and any person engaged in this kind of business who fails to exercise that skill is guilty of gross carelessness. 24 AN. 165.

A person keeping such a warehouse who receives a lot of gunpowder on storage is liable to the owner for its value in case of loss by the sinking of the wharfboat, because the sinking occurred through the failure of the warehouseman to exercise the required skill to prevent it, or by failing to remove the powder on storage before the floating warehouse sunk.

**A** PPEAL from the Tenth Judicial District Court, parish of Caddo. *Levisse, J. O. M. Pegues*, for plaintiff and appellee. *Duncan & Moncure*, for defendant and appellant.

HOWELL, J. By an ordinance of the city of Shreveport, adopted in 1866, and still in force at the time this case was begun, the merchants of that city were required to store all gunpowder kept by them, in quantities exceeding a small specified amount, on a wharfboat lying at the levee and known as the wharfboat of Rapley & Co.

In January, 1868, this wharfboat was kept by the defendant Elstner, as a lessee of Rapley, and in that month the plaintiff stored with him

on this boat a quantity of gunpowder, for the value of which this suit was brought. About two weeks after, without the knowledge or consent of plaintiff, the defendant removed this powder and stored it on another wharfboat named the Cincinnati, lying outside of the Rapley & Co. boat. On Sunday, the ninth of February, the defendant received and placed on this outer wharfboat an unusually large consignment of quartermaster and commissary stores belonging to the United States army, consisting among other articles of seventeen hundred bales of hay and eighteen hundred sacks of grain, weighing some three hundred and fifty tons. A witness employed on her, testifying for defendant, stated that she had never been so heavily laden before since witness had been in charge of her. On Wednesday morning, the twelfth, she began to leak badly, in such a way as to excite apprehension of sinking. Pumps were set to work, but the water still gaining, other pumps were procured by which the water was a little reduced. About noon the defendant's employes began to shift the cargo from the guard next the river and put it on the bow. In the opinion of the witness already quoted, if the hands had then been set to work to remove the cargo they might have saved it. At dark the water in the stern was somewhat lower, and the apprehensions of those on board were somewhat relieved. But the fact seems to have been that this lowering of the water in the stern was produced not by any real reduction in the amount of leakage or the amount of water in the boat, but by the shifting of the cargo to the bow. At nine o'clock in the evening the leaking began to increase, and then for the first time an attempt was made to remove the cargo, but too late. The boat sunk at three o'clock next morning, and the plaintiffs' powder was totally lost. Thereupon this action was commenced for its value, and the plaintiff having had judgment in the court below the defendant appealed.

The appellant makes two points here. First, that his liability is that of a warehouseman; and second, that as such he is only required to exercise ordinary care. We may admit the correctness of both these propositions, and yet fail to perceive any error in the judgment. The question whether a person has failed to exercise ordinary care in his vocation, or what is the same thing, has been guilty of gross carelessness, depends in great measure upon the nature of that vocation. It would be gross carelessness for a workman to smoke in a powder mill; but it might not be gross carelessness for a blacksmith to smoke at his forge. Circumstances proverbially alter cases. And hence it has been held by this court and by the Supreme Court of the United States, that in an employment requiring skill the failure to exercise that skill is gross carelessness. *Bussey v. the Mississippi Valley Transportation Company*, 24 An. 165.

Now, the keeping of a whariboat or warehouse floating on the water is certainly an employment requiring skill. It is exposed to many dangers which do not threaten the business of keeping a warehouse on land. The perils of leakage and sinking are, as appears by testimony in this case, unceasing in their attacks, yet they may be repelled by skillful care, or else the business would come to an end. We think it plain that defendant failed to exercise toward the plaintiffs the skill demanded by his employment. Having, without the consent of plaintiffs, removed their powder from the Rapley boat, where it was safe, to another boat, he received on that other boat for his own advantage and purposes an unusually large consignment of freight. It appears from the testimony that the Cincinnati, before this, was but lightly laden and lay well up in the water, and it is probable that the seams thus exposed had opened, so that when the great weight of army stores was placed upon her and she settled down, the leakage commenced. The testimony also makes it probable that the pumps were inadequate, or the force to man them insufficient. It further appears that the defendant had about twenty hours from the time when the danger of sinking announced itself in which to remove the plaintiffs' powder; and of these ten or twelve were hours of daylight, when there would have been no danger of fire in such removal. It would have required but the work of a few moments to have replaced the powder on the Rapley boat, from which, in strictness, the defendant should never have removed it. After a review of the whole evidence, we are of opinion that the defendant failed to exercise the care which the law requires from one in his business.

Judgment affirmed.

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No. 359.—W. S. EDWARDS v. THE PARISH OF BOSSIER.

94 457  
48 333

Parish warrants which have been issued by the police jury without the authority of law impose no legal obligation or debt upon the parish.

**A**PPPEAL from the Eighteenth Judicial District Court, parish of Bossier. *Watkins, J. J. B. Griffin and J. A. Snider*, for plaintiff and appellee. *Richard W. Turner*, for defendant.

**TALIAFERRO, J.** The plaintiff sues to recover \$2253 10, with interest thereon, being the aggregate sum of eighteen warrants or obligations issued by the police jury of the parish through the president of that body, and made payable to the petitioner or bearer. The answer is a general denial of the liability of the parish on the instruments sued on, and a special averment is made that the parish of Bossier is without power or authority to issue and put into circulation the instruments upon which the action is founded, and thereby bind the parish for

their payment. The defense further is, that if the parish of Bossier were ever legally obligated to pay the warrants held by the plaintiff, it would now, since the formation of the parish of Webster, be bound only for one-half of the amount sued for. The defendant pleads the prescription of five years in bar of the action. There was judgment against the parish for \$2205 35, with interest, and a decree for the assessment and collection of a parish tax sufficient in amount to pay and discharge the debt and all costs. The defendant has appealed.

It is not shown that the police jury of Bossier parish, by any special act of the Legislature, was empowered to issue these negotiable instruments; nor is it shown that the police jury, by ordinance passed at the time it authorized the issuing of them, provided in the manner required by law for their payment. These pretended obligations are therefore void and without effect. No money can be had upon them. Acts of 1853, p. 234; 23 An. 190, 232, 251.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that there be judgment in favor of defendant, the plaintiff and appellee paying costs in both courts.

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110	676

NO. 146.—C. YALE, JR., & CO. v. J. W. HOWARD.

Where a devolutive appeal has been taken from a judgment which directs a certain number of pounds of cotton to be delivered to the plaintiff, or in default thereof to pay a certain amount in money, and execution has issued thereon, the delivery into the hands of the sheriff of the cotton is not a voluntary execution of the judgment, and the devolutive appeal may be prosecuted thereafter.

**A**PPEAL from the Tenth Judicial District Court, parish of Caddo. *Levisse, J. U. M. Pegues*, for plaintiffs and appellants. *Land & Taylor*, for defendant and appellee.

HOWELL, J. The defendant obtained judgment against plaintiffs for "six thousand pounds of ginned cotton, strictly middling, or in default thereof the sum of three thousand one hundred and twenty dollars, the value thereof," and caused execution to issue. Two days after execution was issued the plaintiffs took a *devolutive* appeal, and had the judgment reversed, on the ground that it was enforcing a contract, the consideration of which was Confederate treasury notes.

A few days after the execution issued and an appeal was taken, a cotton broker in New Orleans wrote as follows to the sheriff:

"General H. T. Hays:

"*Dear Sir*—I have purchased the six thousand pounds of cotton for account of Mr. Yale, but the press will not deliver it to-day. Will you please allow the delivery of the cotton to remain over until to-morrow, and oblige," etc. ?



In accordance with this the cotton, which cost nineteen hundred and twenty dollars, was delivered, and a receipt therefor indorsed on the execution.

The question is, was this a voluntary execution of the judgment? A majority of the court think not. It seems manifest that the plaintiffs were acting under compulsion of the law, for they were entreating the sheriff for a time to obey the writ which he was executing, and the fact that they chose to comply with one of the alternative demands of a writ which they could not resist does not, in our opinion, make the execution of the judgment voluntary. The sheriff was commanded to take the cotton or its value. He gave the debtors the right to deliver the cotton, which they delivered in obedience to the mandate of the law; but they continued to prosecute their appeal and were relieved from the judgment. A devolutive appeal implies the right to have the judgment executed and the obligation to refund. It seems to us that under the circumstances the action of plaintiffs was advantageous to the defendant, for had they allowed their property to be seized and sold a much larger amount would be demandable. The case in 14 An. 329, cited by defendant, differs materially from this.

It is therefore ordered that the judgment appealed from be reversed, and that plaintiffs recover of defendant the sum of nineteen hundred and sixty-one dollars, with legal interest from judicial demand, and costs in both courts.

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HOWE, J., *concurring*. I think the plaintiffs were compelled to pay on the defendant's judgment what they did, and are entitled to recover. I therefore concur in the decree in their favor.

WYLY, J., *concurring*.

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LUDELING, C. J., *dissenting*. This is an action to recover the value of six thousand pounds of cotton at thirty and a half cents per pound, which the plaintiffs allege was unduly paid to the defendant in satisfaction of a judgment in the suit of J. W. Howard v. C. Yale, Jr., & Co. It appears that judgment had been rendered in favor of Howard for six thousand pounds of ginned cotton, strictly middling in quality, and in default thereof for three thousand one hundred and twenty dollars. The judgment was based on a contract for Confederate treasury notes. A *devolutive* appeal was taken, and pending the appeal, an execution having been issued under the judgment, C. Yale, Jr., went into the market and bought the amount of cotton specified, at thirty and one-half cents per pound, and satisfied the judgment. Subsequently the judgment in the case of Howard v. Yale, Jr., & Co. was reversed. We think they voluntarily delivered the cotton which

Yale, Jr., &amp; Co. v. Howard.

they had bought for one thousand eight hundred and thirty dollars, in satisfaction of the judgment for cotton or three thousand one hundred and twenty dollars, and that if the fact had been known to the appellate court before the cause was decided, that court would have dismissed the appeal. 14 An. 329. Besides, the contract which gave rise to the obligation of C. Yale, Jr., & Co. was decided to be unlawful. We can not aid C. Yale, Jr., & Co. to recover back what they have voluntarily paid any more than we could help Howard to enforce his contract. I think we should leave the parties where they have placed themselves. 5 R. 101. If there is any equity in the case it is on the side of the defendant, who bought cotton from the plaintiffs and paid them Confederate currency which, though unlawful, had a value at the time, and which C. Yale, Jr., & Co. enjoyed. After the judgment against C. Yale, Jr., & Co. for the price of the cotton sold, as aforesaid, had been rendered by the district court, their cupidity made them choose the alternative given by the judgment of delivering cotton instead of running the risk of having to pay the money judgment; and thus, to some extent, they have been made to discharge an obligation which their consciences should have made them observe. I think there is no error in the judgment of the district court; I therefore dissent.

TALIAFERRO, J. I concur in the dissenting opinion of the Chief Justice in this case.

Rehearing refused.

No. 364.—E. S. OLIVER v. B. M. JOHNSON.

24 480  
52 1292

An agent who has transcended his authority in the collection and investment of the proceeds of notes is not liable therefor, if the principal, on being advised of the collection and investment by the agent himself, fails to notify him promptly that he repudiates his acts.

**A**PPEAL from the Tenth Judicial District Court, parish of Caddo. *Levisse, J. Duncan and Monours*, for plaintiff and appellant; *Land and Taylor*, for defendant and appellee.

TALIAFERRO, J. The plaintiff sues the defendant to recover from him the amount of two promissory notes, one for \$200, the other for \$750, with ten per cent. interest on each, alleging that, in November, 1860, he forwarded to the defendant, living in Shreveport, these two notes for collection—the makers of the notes being residents of Jefferson, in Texas. That the notes were received by Johnson, who is a private banker and collecting agent, but has entirely failed to account to the petitioner for the notes, or for any part of the same.

The defendant in his answer admits that, in the latter part of the

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Oliver v. Johnson.

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year 1860, he received the notes in question for collection; that he sent them to a local collector in Jefferson, Texas, for collection; that repeated efforts were made by him to collect the notes, without success; that he caused the notes to be duly protested at maturity; that, when informed by the collector at Jefferson of his inability to collect the money on the notes, the defendant caused them to be placed by his agent in the hands of an attorney of good standing, to be sued upon, the said attorney undertaking to collect or account for the said notes. The defendant contends that, having used due diligence to collect the notes, and having turned them over to a respectable attorney for suit, his own responsibility as agent ceased, the attorney at law being responsible.

There was judgment for the defendant, and the plaintiff has appealed.

The difficulty between the parties in this case seems to be that the attorney at law collected the notes in confederate treasury notes. The defendant Johnson wrote under date of November 3, 1865, as follows to the plaintiff:

*"Dear Sir—*Yours of 25th ult. received and contents noted. When I received the notes mentioned, I found it necessary to place them in the hands of an attorney at Jefferson for collection. The war came on and stopped everything. In 1863 I received advices from my attorney that the party offered to pay confederate money, and stated all his clients were taking it, and advised me to pursue the same course, which I did, and invested the amount in interest notes, which I have on hand now.

*"Very Respectfully,*

B. M. JOHNSON."

Nearly five years intervened between the date of this letter and the filing of this suit against Johnson to compel him to account.

The plaintiff, in his own testimony, says: "When I received the information from Johnson that he had collected these notes in confederate money and reinvested them in confederate interest-bearing bonds, and that he still had them on hand, I did not consider it necessary to write him that I repudiated the acts of his attorney in Jefferson, and therefore did not do so, as I considered him responsible to me for the acts of his agent, and that he had just as well have said that his agent had stolen the notes, or that he had cast the proceeds into the Mississippi river."

It is a well-settled principle of agency, that the acts of one or the other party, when disclosed to his correlative, should be promptly avowed or disavowed. In the case of *Ward v. Warfield*, 3 An. 471, this court, in relation to the duties and responsibilities of agents toward their principals, said: "If the agent unnecessarily exceed his

commission or risk his principal's effects without authority, he renders himself responsible to the principal. But while this general doctrine may be considered as unquestionable, there are other principles which are equally well settled in the law of agency. Subsequent assent, as between principal and agent, is equivalent to a previous authority; and hence where an agent has committed a breach of orders, and the principal, with full knowledge of all the consequences, adopts his acts, even for a moment, he will be bound by them, and the agent will be discharged. Nor is it necessary that such a spirit should be express. It may be inferred from the conduct of the principal." C. C. 1811; 18 La. 517; 7 N. S. 143; 2 Rob. 1; 11 La. 286.

In *Ball v. Bender*, 22 An. 496—a case similar in its character to the one under consideration—Ainsley, as agent of Bender, had, without express authority, sold cotton of his principal for confederate money. When he heard of the sale Bender said he would rather have heard of his burning the cotton than selling it for confederate money, but did not promptly repudiate the act. In a suit by Ball against Ainsley and Bender, to enforce the contract Ainsley had entered into with Ball, the court on a rehearing on the reconventional demand of the defendant gave judgment against him on the ground that "it was the duty of Bender to notify the plaintiff Ball that he repudiated the act of Ainsley as unauthorized so soon as he was informed of the fact, even if Ainsley had been unauthorized to sell. This he failed to do."

We think the evidence in the case before the court shows a neglect on the part of the plaintiff to disavow and refuse to ratify the unauthorized act of his agent, when informed of it by the agent himself, that will debar him from recovery.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

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No. 323.—*L. GRAND & CO. v. CHARLES P. COX et al.*

The burden falls upon the person who objects to the admission of a certified copy of a mortgage in evidence, on the ground that the original did not contain the required amount of internal revenue stamps upon it, of showing that the stamps were not upon it at the time it was recorded. In the absence of such proof the presumption is that the recorder required the necessary stamps to be affixed before he recorded the act.

**A**PPEAL from the Fourteenth Judicial District Court, parish of Richland. *Ray, J. W. W. Campbell*, for plaintiffs and appellees. *Morrison & Farmer*, for defendants and appellants.

**WYLY, J.** The plaintiffs sue the defendants jointly for \$2715 for supplies furnished them during the year 1867, and claiming a privilege, they sequestered part of their crops; they also seek to foreclose the mortgage given by the defendant Scriber on the land described in the petition. The defense was the general denial.

The court gave judgment for the plaintiffs and the defendant Scriber has appealed.

As to the defendant Cox, the judgment can not be examined, because he has not appealed.

The defendant Scriber excepted to the admission in evidence of the certified copy of mortgage which he gave the plaintiffs on the eleventh December, 1867, because the original act of mortgage was not stamped as required by the revenue laws of the United States.

The recorder's certificate attached to said copy shows that it was duly recorded on nineteenth December, 1867. In the absence of proof to the contrary, we will presume that the recorder did his duty, that he required the necessary stamps to be legally affixed before registering the act. The bill of exceptions was not well taken.

From the evidence we think the court erred in condemning the defendant Scriber jointly with the defendant Cox for \$2715, and also decreeing judgment against him for \$1500, the amount of the mortgage. The amount for which there should be judgment against him is only the amount of the mortgage consented to by him on the eleventh December, 1867.

It is therefore ordered that the judgment against the defendant Scriber be reduced to \$1500, with five per cent. per annum interest thereon from first January, 1868, and as thus amended let the judgment be affirmed.

It is further ordered that appellees pay costs of appeal.

Rehearing refused.

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No. 340.—H. CUSHING, for use, etc., v. T. E. JACOBS.

A due bill for a certain amount given to secure payment of a shipment of cotton from the Red River to New Orleans at so much per bale—the number of bales to be ascertained after the boat arrives at New Orleans—can only be enforced for the number of bales actually carried at the rate agreed on.

**A**PPEAL from the Tenth Judicial District Court, parish of Caddo. *Levisse, J. Land & Taylor*, for plaintiff and appellee. *Nutt & Leonard*, for defendant and appellant.

Howe, J. This action was commenced on the following instrument:

"Due H. Cushing \$1240, charges on cotton taken from the wreck of the steamer D. C. Horton.

(Signed)

(Indorsed)

T. E. JACOBS.

H. CUSHING."

"October 7, 1865."

A number of points have been discussed in the briefs, but the only issue really made by the answer is as to the consideration of the due bill—in respect to which it is averred that "said note was without legal or valid consideration, and that same was signed in error."

The history of the due bill, as we interpret the testimony, is as follows: In October, 1865, the steamer Horton, loaded with about two hundred and seventy-five bales of cotton, sank in Red River. Shortly after the steamer Cricket, commanded by defendant, came to her assistance. It was then agreed that the Cricket should take the cotton from the Horton and transport it to New Orleans, and there collect the full freight for the whole at the rate of \$20 per bale, and pay to the Horton \$10 per bale for all the dry cotton. The transfer from the sunken boat was made in the night and in a hurried manner, and it was estimated that there were one hundred and twenty-four bales of dry cotton, for which, at the rate of \$10 per bale, the due bill was then and there given.

It was understood that the exact number of bales of dry cotton should be definitely ascertained in New Orleans, and on the arrival of the Cricket there, it was found by inspection and sampling that there were but sixty-five bales of dry cotton.

The testimony which discloses this state of facts was received without objection, and is neither impeached nor contradicted. We therefore conclude that the due bill as between the parties ought not to be enforced beyond the amount really contemplated by them at the moment it was signed. This amount is shown to have been \$650.

It is therefore ordered that the judgment appealed from be reduced to the sum of six hundred and fifty dollars, with five per cent. interest thereon from October 7, 1865, and costs of lower court, and that plaintiff and appellee pay costs of appeal.

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NO. 365 —MARTIN L. BAKER v. ELSTNER, KINSWORTHY & Co.

In this case plaintiff took defendants' note in settlement of a debt, and with the knowledge of defendants placed it in the hands of a third party, to whom payment was afterward made.

Plaintiff now seeks to enforce payment against the maker on the ground that the third holder was not authorized to receive payment.

Held—That the loss must fall upon the plaintiff, because it was through his fault that the defendants were enabled to make the payment to the third party.

**A** PPEAL from the Tenth Judicial District Court, parish of Caddo. *Levisse, J. Hicks & Hall*, for plaintiff and appellant. *Duncan & Moncure*, for defendants and appellees.

WYLY, J. Plaintiff appeals from the judgment rejecting his demand against the defendants on a promissory note for \$1000.

The defense is the plea of payment.

It appears that the plaintiff loaned the defendants the sum claimed and took their note in favor of Thomas M. Wynn. He says he took the note in this way to prevent annoyance from a party who he feared would sue him if he knew that he was the owner of the debt due by the defendants.

By the testimony of the plaintiff it also appears that immediately after the note was given, Thomas M. Wynn accompanied him to a neighboring store and there indorsed in full to him the note. He then placed the note in Wynn's hands to keep, pursuant to previous arrangement.

It remained in Wynn's possession until past due. In the meantime the payments were made to Wynn, which the defendants contend extinguished the debt.

The credits were not indorsed on the note, but the defendants took Wynn's receipts. The plaintiff contends that Wynn had no authority to collect the debt, and that the defendants are at fault for not demanding the note before making the payments.

While Wynn held the note, the defendants knowing that he was the payee, and being doubtless ignorant of the indorsement in full, had the right to believe him the owner, and they were justified in making the payments as they did to him. The plaintiff chose to put his claim in the name of Wynn, thereby inducing the defendants to deal with him as owner.

The loss must fall upon the plaintiff rather than upon the defendants, because it was by plaintiff's act that Wynn was enabled to collect the money from the defendants.

We think the judgment is correct.

Judgment affirmed.

#### No. 328.—THOMAS GOOCH et al. v. JOHN LEE GOOCH et al.

An heir who has provoked the appointment of himself as provisional administrator of the estate of his mother, on the allegation that the succession required immediate administration, can not be held and treated as an intermeddler in the estate.

**A** PPEAL from the Tenth Judicial District Court, parish of Caddo. *Levisse, J. Nutt & Leonard*, for plaintiffs and appellants. *R. J. Looney*, Public Administrator, for appellees.

**WYLY, J.** The question presented for adjudication in this case is, can a provisional administrator who has collected funds belonging to the estate, and failed to pay them over to the heirs, be treated as an intermeddler, and the property which he has transferred to a third party be subjected to an hypothecary action on account of the mortgage accorded to minors against intermeddlers? Revised Code 3315. The court *a qua* concluded that the provisional administrator could not be so treated, and gave judgment accordingly.

The plaintiffs appeal. They allege that their mother Martha Gooch died in 1859, while they were minors, leaving certain property, particularly three notes for \$1200 each, due by Mrs. Martha Gibbs, of Mis-

Mississippi. That their brother John L. Gooch collected these notes and has never accounted therefor, thereby becoming indebted to them for the amount claimed in the petition. That they, being minors and unrepresented by a tutor, acquired a legal mortgage on the property of said John L. Gooch, because he intermeddled in the succession of their mother and interfered in the administration of property belonging to them; that said mortgage affects the lot of ground described in the petition, situated in the city of Shreveport, and now possessed by the succession of James Coulter, because the same was owned by the said John Lee Gooch at the time of said intermeddling in the administration of their property, and that its subsequent transfer to Simms and to Coulter did not remove the incumbrance. The public administrator who represents the succession of Coulter contends that the lot in question is not affected by the mortgage:

*First*—Because John Lee Gooch was provisional administrator at the time he collected the claim; besides, he is one of the heirs, and he ought not to be treated as an intermeddler by reason of his office and heirship.

*Second*—Because the lot did not belong to John Lee Gooch, but to his wife Matilda E. Gooch, who acquired it in 1863, the deed containing the following clause:

"It is expressly understood that this purchase is made with Mrs. Gooch's own separate funds; in this, that it is replacing her paraphernal property alienated by her husband."

The public administrator contends that Simms acquired in good faith the lot from Matilda E. Gooch, who held by a title ostensibly valid, and he subsequently transferred the said lot to James Coulter. That, under the authority of *Mercier v. Canonge*, 8 An. 37, said lot in the hands of innocent third persons would not be affected by a tacit mortgage against John Lee Gooch who, at most, only had a covert or equitable interest in the property, the ostensible title being in his wife.

We deem it unnecessary to decide this point, because the first objection, in our opinion, disposes of the case. We think the provisional administrator was not an intermeddler.

John L. Gooch, one of the heirs, applied to the court to be appointed provisional administrator, representing that the succession of his mother required immediate administration; that it consisted mainly of promissory notes due by a person residing in Mississippi, and it was to the interest of all the heirs that the money be collected immediately; "*that it will be dangerous to wait the delay of the time prescribed by law for the appointment of an administrator or curator, and that for this purpose alone he be appointed provisional administrator.*"

The court appointed him; he took the oath and gave bond for \$6500, the inventoried value of the estate being \$5950. Whether



or not the court erred in appointing him is immaterial. He took the oath and gave the bond required by the judge, and in proceeding to accomplish the object of his appointment he can not be regarded as an intermeddler. Where it was necessary to preserve the estate, the judge had the right to appoint a provisional administrator, and the person so appointed will not incur the penalty announced in article 3315 Revised Code, where he merely performs the duty contemplated in the appointment.

It is therefore ordered that the judgment herein be affirmed, with costs.

NO. 209.—ROGERS & WOODALL v. JASPER GIBBS.

When a person not a party to a promissory note puts his name upon the back of it he binds himself as surety, and as surety he is bound *in solido* to the holder.

Citation served upon one of several obligors *in solido* interrupts the current of prescription as to all the obligors. The plea of prescription can not therefore be maintained by one obligor *in solido* if service of citation has been made upon another obligor *in solido* before prescription has been acquired.

**A**PPEAL from the Eleventh Judicial District Court, parish of Claiborne. *J. F. Pierson*, Judge *ad hoc*, in place of *Egan*, Judge, recused. *J. & J. W. Young* and *L. B. Watkins*, for plaintiffs and appellants. *Henry Gray*, for defendant and appellee.

**LUDELING**, C. J. In March, 1860, *J. J. Wilder & Co.* executed two promissory notes, each for \$4407 09, payable respectively in twenty-four and thirty-six months after date, to the order of *Rogers & Woodall*; and at the same time *Rogers & Gibbs* and *J. Gibbs* wrote their names on the back of said notes. *Rogers & Woodall*, the payees, have never indorsed the notes. *Jasper Gibbs* is now sued by the payees as surety. The defendant, without pleading to the merits, filed the plea of prescription against the notes. There was judgment in favor of the defendant, and the plaintiffs have appealed. The notes are prescribed unless there has been an interruption of the prescription by the citation served upon *Hiram Gibbs*, one of the firm of *Rogers & Gibbs*, on the fifth of February, 1867. And whether that citation interrupted the course of prescription as to *Jasper Gibbs* depends upon the character of the obligations which he and *Rogers & Gibbs* contracted by writing their names across the back of said notes. The defendant contends that he incurred the obligation of an indorser, while the plaintiffs insist that he is liable as a surety, and is solidarily bound with *Rogers & Gibbs*; and that the interruption of prescription as to one of several obligors *in solido* is an interruption as to all. More than a quarter of a century ago Chief Justice *Eustis*, as the organ of this court, said: "We consider that it is settled by the uniform jurisprudence of this State that when a person not a party to a note puts

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his name on the back of it he is presumed to bind himself as surety." *McGuire v. Bosworth*, 1 An. 248; *Penny v. Parham*, 1 An. 275; *Story on Promissory Notes*, § 133, 134. And the same doctrine is affirmed in 4 An. 273, 9 An. 533, 20 An. 348, 22 An. 41; see also *Cooley v. Laurence*, 4 M. 639; 3 N. S. 659, 10 La. 374, 14 La. 386, 4 R. 161, 2 An. 592. The same doctrine is held in other States of the Union. In *Tenny v. Prince*, 4 Pickering 385, Chief Justice Parker said: "The principle by which our decisions have been regulated, from the case of *Joselyn v. Ames* downward, is that when the indorsement is made at the time of making the note, the person indorsing the note is to be treated as an original promisor; and this because he is supposed to have parted with something valuable on the strength of the liability of the party who puts his name on the note; and as such party can not be answerable as an indorser, he shall be answerable as an original promisor." See also 11 Mass. 436, 3 Mass. 274, 12 Mass. 14, 4 Pick. 311, 22 Howard 341, *Rey v. Simpson*, *Story on Promissory Notes*, § 470.

Were they, as sureties, bound *in solido*, in the sense of article 2072 of the Civil Code?

"There is an obligation *in solido* on the part of the debtors when they are all obliged to the same thing, so that each may be compelled for the whole thing, and when the payment which is made by one of them exonerates the others toward the creditors." C. C., art. 2091.

It is manifest in this case that each obligor was bound to discharge the whole debt due to the plaintiff, and that the payment by one would exonerate the others toward the creditors. It would seem, therefore, that the defendant comes clearly within the definition of a debtor *in solido*.

The defendant's counsel have relied upon the cases of *Jacobs v. Williams*, 12 R. 184, and *succession of Voorhees*, 21 An. 659, to show that the liability of the defendant is not that of a debtor *in solido*, and that the citation served on Rogers & Gibbs did not interrupt prescription as to Jasper Gibbs. In the case of *Jacobs v. Williams* it is decided that the maker and indorsers of a note are not debtors *in solido* in the sense and meaning of the Code; and that "the payee, or whoever may have lent his name to the maker or drawer, could not be permitted to recover from either more than he had paid; but that as to all other parties who come after the payee on the bill, the *lex mercatoria* was to apply and to govern their rights and obligations. In the case of *Williams* the suit was brought by *Jacobs*, the holder of a note drawn by *James D. Spurlock* to the order of *Williams*, and by *Williams* indorsed in blank—a totally different state of facts from those shown in this case.

In the case of *succession of Voorhees*, 21 An. 660, what was said in regard to sureties not being bound *in solido* was an *obiter dictum* and

not binding as authority. The question there was whether prescription of a bond had been interrupted by the acknowledgment of one who had bound himself to pay a debt in default of Voorhees, and the proof was that more than five years had elapsed after the last acknowledgment of the debt by the guarantor or surety.

Nor is it logical to say that because article 3553 (3518) declares that "a citation served on the principal debtor, or his acknowledgment, interrupts the prescription on the part of the surety," therefore the acknowledgment of the surety does not interrupt prescription as to the principal. There may be obligations where the sureties have limited their liabilities and have not bound themselves *in solido*; and the article above referred to would make the acknowledgment of the principal in such an obligation interrupt the prescription as to his sureties, although not bound *in solido*.

Toullier says: "Cependant l'art. 2021 du Code porte que l'engagement de celui qui c'est, en qualité de caution, obligé solidairement avec le débiteur, se règle par les principes établis pour les dettes solidaires." Vol. 6, No. 723, 753.

In giving his views, as to the reasons why the Roman law gave to the acknowledgment of one of several debtors *in solido* the effect of interrupting prescription as to the others, Toullier says: "On la trouve dans la nature même de l'obligation solidaire, et cette raison nous paraît clairement indiquée dans la loi même, qui porte qu'il est équitable, *humanum*, que la reconnaissance ou l'interruption d'une dette créée par un seul et même contrat, *uno codemque contractu*, oblige également tous les débiteurs à payer la dette parce qu'elle procède de la même source.

"En effet, lorsque plusieurs débiteurs s'obligent solidairement par un seul et même contrat à une seule et même dette, ils se mettent par cela même en société pour ce qui concerne cette dette, ils se chargent mutuellement par un mandat tacite, mais réel, de payer les uns pour les autres, ou, comme porte la disposition finale de l'article 1216, ils sont *cautions* les uns des autres. Celui des débiteurs qui paie seul pour tous les autres agit donc tant pour lui que pour chacun de ceux dont il paie la part. S'il reconnaît seul la dette, il la reconnaît également, tant en son propre nom que dans celui de ces codébiteurs, en vertu de leur mandat tacite; enfin, en agissant contre un seul, le créancier agit contre le mandataire de tous, contre la caution de tous: l'interruption doit donc produire son effet contre tous." Vol. 6, No. 729, p. 757.

Article 3045 (3014) C. C. declares: "The obligation of the surety toward the creditor is to pay him in case the debtor should not himself satisfy the debt; and the property of such debtor is to be previously discussed or seized, unless the security should have renounced the plea of discussion, or should be bound *in solido* jointly with the

debtor, in which case the effects of his engagement are to be regulated by the same principles which have been established for debtors *in solido*." 4 An. 273.

The plea of prescription should have been overruled.

It is therefore ordered that the judgment of the court *a qua* be annulled, that the exception be overruled, and that the cause be remanded to be tried on the merits.

It is further ordered that the appellee pay costs of this appeal.

HOWE, J, *concurring*. I concur in the conclusion in this case, on the authority of *McCausland v. Lyons*, 4 An. 273. There may be some doubts as to the correctness of that decision on principle, but it has stood on the books unchallenged for many years, and there seems to be no sufficient reason for disturbing it.

NO. 308.—CAROLINE BRYAN, Wife, etc., v. C. K. GILLESPIE.

The act creating the parish of Red River and attaching it to the Eleventh Judicial District became a law subsequent to the act creating the Eighteenth Judicial District, which prospectively included the parish of Red River in that district.

Held—that the subsequent act creating the parish of Red River and attaching it to the Eleventh Judicial District showed that the legislative intention was changed, and that the parish of Red River having been first prospectively attached to the Eighteenth Judicial District was afterwards attached to the Eleventh.

**A** PPEAL from the District Court, parish of Red River. *Levisse, J. Elam & Wimple*, for plaintiff and appellant. *A. B. George*, for defendant.

HOWE, J. The only question in this case is presented by an exception, and is whether the parish of Red River is attached by law to the Eleventh or to the Eighteenth Judicial District.

The act establishing the Eighteenth Judicial District and assigning (in anticipation) the parish of Red River thereto, was approved and became a law February 27, 1871.

The act to form a new parish, to be called the parish of Red River, was approved and became a law on the second of March, 1871, and by this act it is provided that the parish shall form a part of the Eleventh District.

The evident presumption from these facts is that the legislative intention was changed, and that after having just assigned the parish in advance to the Eighteenth District the lawmaker afterwards saw fit to attach it to the Eleventh.

Judgment affirmed.

Rehearing refused.

**No. 300.—SURGHNOR & MULLIN v. JOHN A. BEAUCHAMP—P. J. LARKIN,  
Intervenor.**

A conventional subrogation of a privilege given to secure the payment of a draft must be made at the time it is paid. R. C. C. 2160.

If a legal subrogation has taken place in favor of the person who has paid the draft, and the drawer has deposited a lot of cotton with the drawee sufficient to pay a superior privilege claim for rent, then and in such case the proceeds of the cotton will be first imputed to the payment of the rent note, and the legal subrogee has not such a privilege on the crop as will entitle him to provisionally seize it.

**A** PPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J. Stubbs & Cobb*, for plaintiffs. *Newton & Hall*, for defendant and intervenor, appellants.

WYLY, J. On the seventeenth of December, 1869, the defendant leased from Edward Nalle a plantation for the year 1870 for \$1200, evidenced by a draft of the defendant on the plaintiffs for \$600, payable in sixty days, which was accepted, and by a note payable the fifteenth of November, 1870, for \$600.

On the twenty-second of October, 1870, Nalle transferred the draft and note to plaintiffs and subrogated them to his privilege as lessor on the crop of the defendant.

The note was subsequently paid.

On the seventeenth of December, 1870, the plaintiffs brought this suit on the draft which they allege they paid at maturity, and alleging the lessor's privilege to which they claim a conventional subrogation, they provisionally seized the crop on the leased premises. On the twenty-first of December, 1870, Porter J. Larkin intervened, claiming to be a sub-lessee, and also the owner of the property seized. He denied that the plaintiffs have a privilege of any kind on the property, and denied that the defendant owed them anything on account of said rent.

The defendant pleaded the general issue and averred that the draft sued on was paid.

The court gave judgment for the plaintiff for the amount claimed, and the defendant and intervenor have appealed.

It is very evident that the plaintiffs were not conventionally subrogated to the lessor's privilege for the amount of the draft, because by their averment in the petition the draft was paid at maturity, which was the seventeenth of February, 1870. It was not till the twenty-second of October following that Nalle made the act of conventional subrogation. He could not, then, subrogate the plaintiffs to the draft which he did not own—they having paid it on the seventeenth of February previous. Revised Code 2160, But assuming, for argument, that the plaintiffs acquired a legal subrogation when they paid the draft in February, 1870, we do not find that they have a privilege on the crop and have the right to provisionally seize it, because it appears

that in April, 1870, the plaintiffs received from the defendant the proceeds of eleven bales of cotton, to wit, \$797 75. They say they applied it as a credit to an account which they had against the defendant.

We find the draft for rent, which is the basis of this action, charged as an item in that account. It was the most onerous debt, and to it the law imputed the payment. Revised Code 2166.

Besides, the testimony in the record satisfies us that the proceeds of this cotton were turned over to the plaintiff's for the purpose of paying the draft for rent.

It is therefore ordered that the judgment appealed from be annulled, and it is ordered that plaintiffs demand be rejected with costs of both courts.

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No. 368.—JAMES F. HOUSTON, Administrator, v. W. CHILDERS et als.

An exception to the capacity of the plaintiff to stand in judgment should not be permitted to be filed after the general issue has been pleaded, because the general issue admits the capacity of the plaintiff. 21 An. 188.

Property of a succession under administration can not be seized and sold under a judgment against the deceased owner. A sale of property or lands thus situated under a writ of *feri facias* issued from the district court is an absolute nullity, and the purchaser is responsible to the succession for rents from the date of the notice of seizure, but the claim for rent is prescribed by three years.

**A**PPEAL from the Eighteenth Judicial District Court, parish of Bossier. *Watkins, J. J. D. Watkins and Griffin & Snider*, for paintiff and appellee. *Richard W. Turner*, for defendants and appellants.

WYLY, J. In 1865 W. Childers bought the land described in the petition at sheriff's sale under his judgment against Elizabeth Houston, for the price of \$2000.

The plaintiff, the administrator of the succession of the said Elizabeth Houston, sues to annul the said sale and to recover the property, with rents, on the ground that it was an absolute nullity, because Elizabeth Houston was then dead, and her property could not be sold under a writ of *fi. fa.* He also alleges the formalities of law were not complied with in said intended sale.

The defendants plead the general issue and aver the validity of their title. But if it should be held to be invalid, they pray for the return of the \$2000, the price of adjudication, before a writ of possession issues against them for the land. In reconvention to the claim for rent, they pray for \$3000, the value of the improvements placed on the land by them. They also plead the prescription of one, two and three years.

The defendants subsequently excepted to the capacity of the plaintiff.

The court decreed the nullity of the sale of the fifth of November, 1865, and ordered the land to be restored to the succession represented by the plaintiff. The reconventional demand was rejected; there was judgment for the plaintiff for rent at the rate of \$800 per annum from sixteenth February, 1868, until first January, 1871, and thereafter at the rate of \$200 per annum. From this judgment the defendants appeal.

As to the exception to the capacity of the plaintiff to stand in judgment for the succession of Elizabeth Houston, we think the court did not err in refusing to allow it to be filed. The general issue already pleaded admitted the capacity of the plaintiff. See *Silvernagle & Co. v. J. A. Fluker*, 21 An. 188; see also 17 An. 277; 19 L. 429; 14 An. 657; 11 An. 688; 6 An. 97; 10 An. 140; 11 R. 7; 6 R. 484; 12 L. 618.

The sale of the property belonging to the succession of Elizabeth Houston, under the judgment of W. Childers, against her was a nullity. The district court had no jurisdiction to issue a writ of *fi. fa.* against property belonging to a succession under administration.

"Courts of probate have exclusive power— \* \* \*

"*Fifth*—To grant orders, to make inventories and sale of the property of successions which are administered by curators or testamentary executors, or in which the heir prays for the benefit of inventory." C. P. 924.

"All debts in money which are due from successions administered by curators appointed by courts and by testamentary executors *shall be liquidated and their payment enforced* by the court of probate of the place where the succession was opened." C. P. 983.

The defendant Childers has no right to claim the restoration of the price of adjudication, because the property was sold to him under his judgment, and he doubtless retained the price, or at most he paid it to the sheriff, who returned it to him, as he was bound to do under the writ.

A judgment creditor has no right to seize under *fi. fa.* succession property, buy it himself, and then demand of the administrator the restoration of the amount bid before the property shall be returned to the estate. The probate court has the right to distribute the funds of a succession according to the rank and privilege of creditors. No creditor can by the illegal use of the writ of *fi. fa.* gain an advantage in the collection of his claim. He can not by it acquire possession of succession property and then refuse to surrender it to the administrator till his debt, or part thereof, is paid.

The judge did not err in holding that the prescription of three years is applicable to the claim for rent; that the rent prior to three years from the suit is barred. But he erred in fixing the date of the suit from the day the petition was filed; it was only from the service of citation on W. Childers, to wit, ninth March, 1871.

The plaintiff may therefore recover rent from ninth March, 1868, at the rate of \$800 per annum (the value thereof proved) till first January, 1871.

The value of the rent since the first of January, 1871, is not proved; and the judge erred in allowing judgment therefor at the rate of \$200 per annum.

It is therefore ordered that the judgment appealed from be amended by striking out that part for rent, and in lieu thereof let the plaintiff recover of the defendant rent at the rate of \$800 per annum from ninth day of March, 1868, till first day of January, 1871. As thus amended let the judgment be affirmed.

It is further ordered that the appellees pay costs of appeal.

#### NO. 311.—STATE OF LOUISIANA v. SAMUEL KUHN.

In a prosecution for retailing spirituous liquors without a license it is sufficient if the indictment charges the person with retailing spirituous liquors without first obtaining a license therefor, without specifying the person to whom it was sold, or the quantity sold.

Where authority has been given to the parish by the Legislature to impose a license upon persons who are engaged in retailing spirituous liquors, the indictment for retailing spirituous liquors without first obtaining a license therefor, need not show affirmatively that the parish had the right to impose such license.

**A**PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. W. W. Farmer*, District Attorney, for the State. *W. J. Q. Baker* and *R. G. Cobb*, for defendant and appellant.

**HOWELL, J.** The defendant having been found guilty of retailing spirituous liquors without previously obtaining a license, has appealed from a judgment sentencing him to pay a fine of three hundred and five dollars. Before trial he moved to quash the indictment, on the following grounds:

*First*—That the indictment is insufficient in law and defective in this, that the charge is too general, and does not specify the person to whom the sale was made; it does not specify the quantity sold; it does not negative the fact that the accused had a license to sell.

*Second*—The indictment is insufficient in this, that it does not state or allege that the quantity sold was less than one quart; it does not specify the quantity sold or retailed, nor does it state the minimum that may be sold without license; nor does it state that the quantity retailed was not a part of a larger quantity.

*Third*—The indictment does not state affirmatively that the parish of Ouachita had the right, or authority, or ability to issue licenses on the first day of February, 1872.

The indictment is based on the following law:

“Sec. 910. Whoever shall keep a grog or tippling shop, or retail



spirituous liquors without previously obtaining a license from the police jury, town or city authorities, on conviction shall be fined not less than one hundred dollars nor more than five hundred dollars; and in default of payment, shall be imprisoned not less than fifteen days nor more than four months." R. S. of 1870.

The indictment is in the following words:

"That Samuel Kuhn, etc., did retail spirituous liquors without then and there previously obtaining a license therefor from the police jury of the parish of Ouachita, and without then and there previously obtaining a license therefor from any town or city authorities, contrary to the form of the statute," etc.

I. and II. These grounds of the motion present but one point—the failure to allege the facts which constitute the offense charged. It is contended by the appellant's counsel that the word "retail," as used in the law, has a technical and descriptive signification, and it is necessary that the indictment should contain the elements of the offense; that is, what particular quantity is established as retail, or less than which is retail, and to sell which a license must be previously obtained, and specify the person to whom such sale is made.

We do not concur in this view. The offense is a statutory one—the retailing of spirituous liquors without first procuring a license—and the indictment following the words of the statute is sufficient. We deem it unnecessary for the indictment to give the definition of the word retail, or specify what constitutes retailing, under the provisions of the law, as distinct from selling at wholesale or otherwise. It is the pursuing of the particular kind of business without a license that is made an offense, and not the selling of a particular quantity of spirituous liquors on a particular day to a particular person. The accused is notified of the charge that on a certain day he did retail spirituous liquors without first procuring the license required by law; that is, that on that day he was pursuing the business without license.

III. "The indictment does not show affirmatively that the parish of Ouachita had the right, or authority, or ability to issue licenses on the first day of February, 1872."

We are unable to perceive the legal force of this ground. The authority in this respect had been conferred by the Legislature, and whether the parish had or had not submitted the question of license or no license to the voters can have no effect to relieve the defendant from the obligation of procuring a license and the liability to prosecution for not obtaining it. If the question had been submitted to the voters and decided in the negative, the defendant would be guilty of the offense announced in section 910, if he were to pursue the business of retailing spirituous liquors without license. Being unable to legally obtain a license, he would violate the law which made a license neces-

sary under a penalty. If the question had been decided in the affirmative, he would equally be bound to procure a license before he could commence the business; and so if the question had not been submitted to the voters. In any and every contingency the defendant must first procure the license from the police jury before he can retail spirituous liquors, otherwise he will be obnoxious to the penalty presented in section 910, above quoted.

The bill of exceptions to the refusal of the District Judge to charge the jury that section 23 of act No. 42 of 1871; section No. 1, clause No. 10, of act No. 14 of 1872, and section No. 1, clause No. 9, of act No. 17 of 1872, are in force, and to his refusal to read to the jury act 23, R. C. C., was not well taken. Those laws have no relation to the subject in this prosecution. The said acts relate to the revenue of the State, and not to the subject of section 910 R. S. under which this prosecution is had, and do not impliedly repeal the latter, under act 23 of the Code.

Judgment affirmed.

Rehearing refused.

#### NO. 280.—HENRY BURNS v. THOMAS NAUGHTON.

An appeal will not be dismissed because a copy of the petition of appeal has been sent up with the record in place of the original.

A third holder of a mortgage note under indorsement must show an authentic transfer before he can legally obtain an order of seizure and sale of the property mortgaged.

**A**PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. Morrison & Farmer*, for plaintiff and appellee. *J. & S. D. McEnery and Stubbs & Cobb*, for defendant and appellant.

**TALIAFERRO, J.** The defendant appeals from an order of seizure and sale rendered by the Judge of the Fourteenth Judicial District decreeing the sale of certain mortgaged property belonging to the defendant. The ground upon which the appeal is predicated is, that authentic evidence was not produced before the judge to establish the transfer to the plaintiff of the note upon which the mortgage is alleged to be founded. There is a motion to dismiss the appeal for the reason that a copy of the petition of appeal was sent up in the transcript, the appellee contending that the original act should have accompanied the record, and refers to several articles of the Code of Practice to sustain this position.

There is no more reason why the written act constituting the petition of appeal and filed as an original act should appear *in propria forma* before the appellate court instead of a duly certified copy of it, than that the original petition in a suit, or any other original paper of a suit, should be transmitted instead of a certified copy of such

original. The terms used in the articles of the Code of Practice to which we are referred, might perhaps authorize the transmission of the original petition of appeal with the transcript; but that it is imperatively required that it should be so transmitted we do not admit. The purpose of the lawmaker, we conclude, would in this regard be as substantially complied with by the transmission in the record of a duly authenticated copy of the petition of appeal as by the transmission of the original act itself.

The motion to dismiss is overruled.

#### ON THE MERITS.

The plaintiff is third holder of the note upon which the mortgage he seeks to enforce is founded. He alleges that he holds the note under the blank indorsement of the payee. There is no authentic evidence of the transfer shown. This was necessary in the proceeding *via executiva* which the plaintiff has chosen to adopt. 6 An 477, 9 An. 310, 11 An. 4, *ibid* 35, 19 An. 141. The order was therefore improperly rendered.

It is therefore ordered, adjudged and decreed that the order of seizure and sale rendered in this case be annulled and set aside.

It is further ordered that this case be dismissed as of non-suit, the plaintiff and appellee paying costs in both courts.

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#### NO. 332.—GRAHAM & ANDERSON v. JOHN HENDRICKS, SR.—KENDALL & WRIGHT, Intervenor.

If an appellant dies after the appeal has been granted, but before the bond has been given and filed in the court below, then only the legal representatives of the deceased can execute the appeal bond. An appeal bond given by the agent after the decease of the principal is void, because the agency ceases at his death.

**A**PPEAL from the Tenth Judicial District Court, parish of Caddo. *Levisse, J. Land & Taylor*, for plaintiff. *R. J. Looney*, for defendants.

LUDELING, C. J. The plaintiffs in this case have moved to dismiss the appeal on the grounds that the defendant died before filing the appeal bond in the district court, and there is no administrator appointed to represent the succession and no acceptance thereof by the heirs.

The appeal has never been taken until the bond has been filed; there is no appeal in this case; the agency of the attorney to act in the case ceased at the death of the defendant, and there being no representative of the succession authorized to act, the filing of the bond was unauthorized, and appeal is inchoate only.

It is therefore ordered that the case be stricken from the docket of this court.

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Mrs. Julia Dull v. Gordon.

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## No. 325.—MRS. JULIA DULL v. WM. R. GORDON.

If a note has been offered in evidence by the defendant to show its payment, and has been rejected on the ground that it is not sufficiently proved, then parol evidence is admissible as the next best evidence to prove that it has been paid.

Parties holding an obligation, who have received payments thereon in confederate notes and given credit therefor, are bound by their acts, notwithstanding such notes are not a legal tender in payment of debts. The settled doctrine in all such cases is, that the courts will leave the parties where their conduct has placed them.

**A**PPPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. Morrison & Farmer*, for plaintiff and appellee. *Stubbs & Cobb*, for defendant and appellant.

LUDELING, C. J. The plaintiff sued the defendant for \$2573, with legal interest since the twenty-ninth of August, 1864, when, it is alleged, he used two notes belonging to plaintiff amounting to that sum, in the purchase of a tract of land for himself. She annexed to her petition the receipt of Gordon, which, however, she avers does not express her understanding of the agreement about the notes. She admits that Gordon has paid small sums to her at different times, but she avers she does not remember the amounts.

The defense is that he bought the notes and agreed to pay the price in the manner stated in the receipt annexed to the petition, and that he has extinguished the obligation by payments, as per statement annexed to the answer. This statement showed that at various times defendant paid at her request sums of money and bills for merchandise and groceries for her.

There was judgment in favor of the plaintiff, and the defendant has appealed.

On the trial the defendant offered in evidence the following receipt:

“Received of W. R. Gordon, Millhaven, March 19, 1864, five hundred dollars, toward paying for two mortgage notes on John Mallory, the balance to be paid whenever I call for it. JULIA DULL.”

To the reception whereof the plaintiff excepted on the grounds that it was not sufficiently proven, and was not stamped as required by the revenue acts of the United States.

These objections were overruled, and we think correctly.

Mr. Gordon testified as follows:

“I handed her the money with the receipt written. She went into the house with the receipt and the money, and returned it, the receipt, to me signed.”

If the document was inadmissible as a receipt for money, it was admissible as a memorandum or letter to show how she construed the receipt given by Gordon to her for the notes, or her agreement relative to the notes. The defendant then offered in evidence a note in favor of Dr. Bloxom, signed Julia Dull, to prove an item in the statement

annexed to his answer—that is, that he had paid the note to Bloxom at her request.

This was objected to on the grounds that the note was not proven and it was not stamped. These objections were sustained by the court *a qua*, and then the defendant offered to prove by parol that he had paid the amount of said note to Dr. Bloxom at the request of the plaintiff. This was objected to on the ground that if the defendant had paid any note for her, the note itself was the best evidence. This objection was overruled and the plaintiff took a bill of exceptions.

Having objected to the reception of the note paid, it is difficult to conceive how it could consistently be objected that parol testimony should be rejected as not the best evidence of the fact of payment of the note. It is unimportant whether the note to Bloxom ever had any legal existence or not—if Gordon paid an amount of money to Dr. Bloxom for Mrs. Dull at her request—those facts may be proved by parol.

The receipt annexed to the petition is in the words and figures following, to wit:

“Received, Millhaven, nineteenth March, 1864, of Mrs. Julia Dull, two mortgage notes against John Mallory, and made payable to his own order in favor of or belonging to Mrs. Julia Dull, for which I am to pay her over the money in small amounts as she may call for it, until the amount of the notes is paid up. The notes are given for one thousand dollars each; one is due first January, 1864, and one first January, 1865.

(Signed)

“W. R. GORDON.”

This receipt bears the same date as the receipt given by the plaintiff, acknowledging the receipt of five hundred dollars from W. R. Gordon, already referred to; and it was several months before the defendant used the said notes in the purchase from Mallory. It may be well here to remark that the two notes received from the plaintiff were for the two last installments of the price of a tract of land sold to John Mallory; that Gordon had acquired the other two from Colonel Morrison, and used the four notes in payment of the price of the land which Mallory had bought, and upon which there existed a special mortgage to secure their payment. The evidence convinces us that the defendant purchased the notes of plaintiff and obligated himself to pay the principal and interest thereof in the manner stated in the two receipts—that is, as the plaintiff might call for the price. And the various credits claimed and proved by the defendant must be regarded as payments made under this obligation, and, *pro tanto*, as an execution of the contract.

It appears that the five hundred dollars paid on the nineteenth of March, 1864, was in confederate treasury notes, and it is also probable

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Mrs Julia Dull v. Gordon.

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that the item of seventy dollars was paid in confederate notes; and it is urged that because these payments were made in that currency we can not allow them as credits. When payment of an obligation has been received by the obligee in confederate treasury notes, the courts will not interfere; to the extent of the payment it is an executed contract. 19 An. 473.

Allowing the credits claimed, except the item for house rent in 1867, one hundred and twenty dollars, which we think should not be allowed, and computing interest on the notes at the rate of eight per cent. per annum, to the nineteenth of March, 1864, the date of the sale, and thereafter at the rate of five per cent. per annum interest, and imputing the payments first to the extinguishment of interests, we find that the defendant was indebted to the plaintiff in the sum of five hundred and ninety-three dollars and eighty-six cents, with five per cent. per annum interest thereon from the thirty-first December, A. D. 1869.

It is therefore ordered and adjudged that the judgment of the lower court be annulled, and that there be judgment in favor of the plaintiff against the defendant for five hundred and ninety-three dollars and eighty-six cents, with five per cent. per annum interest thereon from the thirty-first December, 1869, till paid, and costs of the lower court.

It is further ordered that the appellee pay costs of this appeal.

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No. 335.—W. M. GRIFFIN v. J. A. HAYNES.

A clerk or bookkeeper employed in a store by the year who has been discharged before the term of his employment has expired, for good and sufficient cause, can only recover wages up to the time of his discharge.

**A**PPEAL from the Eighteenth Judicial District Court, parish of Bossier. *Watkins, J. Griffin & Snider*, for plaintiff and appellee. *J. D. Watkins*, for defendant and appellant.

This case was tried by a jury in the court below.

HOWELL, J. Plaintiff claims \$675, with legal interest from fifteenth February, 1870, amount of a note, \$120, with legal interest from first January, 1871, for three months wages, at \$40 per month, as clerk up to said date, and \$600, with same interest from judicial demand for one year's salary at \$50 per month as clerk from the first January, 1871, defendant having, it is alleged, discharged him on first March, 1871, without sufficient cause or any serious grounds of complaint. Defendant admits the claim for \$675 and that for services as clerk at \$40 per month for three months ending thirty-first December, 1870, except for one-half month lost time, which claims he says are subject to compensation or set-off; denies owing any thing for 1871; avers an agreement for said year with plaintiff as clerk and bookkeeper by the month only,

and his discharge about first March, 1871, for sufficient cause, which he then first learned, to wit, unfaithfulness and incompetency, and claims in compensation and reconvention balances due on two notes of plaintiff, amount of an account against plaintiff and \$500 damages.

The case was tried before a jury, and on their verdict a judgment was rendered in favor of plaintiff for \$1395, and in favor of defendant for \$718 00 $\frac{1}{4}$ , leaving a balance in favor of plaintiff of \$676 90 $\frac{1}{4}$ , from which defendant has appealed.

The principal controversy is in regard to the claim for wages for the whole of the year 1871. The evidence satisfies us that the engagement was for the year, and the question is as to the sufficiency of the cause for the discharge. Had defendant any serious ground of complaint against plaintiff when he sent him away? R. C. C. 2749.

It seems that defendant was satisfied with plaintiff as bookkeeper and clerk until about the end of February, 1871, when by accident he learned that an article of merchandise had been sold by plaintiff on a credit, but no entry made of it in the books. This led to an examination of the books, and defendant discovered a want of correspondence in some of the entries in the different books, many erasures in the day book and blotter, and a discrepancy in the cash on hand and the amount entered in the cash book. Plaintiff was thereupon called on to explain the cash discrepancy, and he asked until the next day to examine the books and make the corrections. This was refused, and defendant took possession of the books, and the discharge of the plaintiff followed.

In our opinion these circumstances authorized the discharge, unless plaintiff satisfactorily explained them to defendant, which he failed to do. His reason for not having charged the item which led to an examination on the part of defendant was not a good one, and this, in connection with the condition of the books, was well calculated to impair defendant's confidence in him as a competent and reliable bookkeeper and clerk. The condition of the books and accounts shows that plaintiff is incompetent or careless, and either is a serious ground of complaint on the part of a merchant. It is important that the confidence of a merchant in his employe should be maintained.

The discharge therefore was warranted by the facts and law.

The evidence shows that plaintiff is entitled on his demands to the sum of \$845 at the date of his discharge, and that defendant has valid claims against him amounting to \$552 25, leaving a balance in favor of the former of \$342 75.

It is therefore ordered that the judgment appealed from and the verdict of the jury be set aside, and that there be judgment on the principal and reconventional demands in favor of plaintiff for \$342 75, with legal interest from first February, 1871, and costs in the lower court; costs of appeal to be paid by the plaintiff.

## No. 331.—ELIZA W. WOOLEY v. E. K. RUSS et al.

The sale by authority of the probate court of real estate extinguishes the mortgages upon it prior to the sale and transfers them to the proceeds, and a purchaser has the legal right to restrain by injunction the further pursuit of the lands by the mortgage creditors. A sale of this kind can only be attacked by direct action.

**A**PPEAL from the Tenth Judicial District Court, parish of Boasier. *Watkins, J. Robert J. Looney*, for plaintiff and appellant. *J. D. Watkins*, for defendants and appellees.

TALIAFERRO, J. This case was before us at the last term at this place, and was then remanded for a new trial. See 23 An., p. 580.

Carroll, Hoy & Co., creditors of Samuel Harrison, deceased, who was the husband of the plaintiff, proceeded *via executiva* to seize certain lands specially mortgaged to them by Harrison shortly before his death in 1865, to secure the payment of his debt to them, amounting to near nine thousand dollars, for which he gave his note payable three years after date, with interest. This seizure was enjoined by Mrs. Wooley, the plaintiff, on several grounds, among them that the succession of Samuel Harrison had been administered and finally settled; that the land belonging to it had been sold at probate sale, and that she had become the owner of it; that the mortgage of Carroll, Hoy & Co. had been extinguished by the sale, and that there were no proceeds to be applied to their debt, the funds having been exhausted by prior privileges and mortgages.

To this injunction suit the seizing creditors were not made parties, and had no notice of the proceeding. The injunction was perpetuated and on appeal the case, as already stated, was remanded. Thereupon Carroll, Hoy & Co. filed an answer and changed the form of their action to that of *via ordinaria*, and assuming the position of plaintiffs in reconviction prayed judgment against Mrs. Wooley for one-half the debt and against the two minor heirs of Harrison for the other half, with right of mortgage. The answer sets up by numerous allegations the illegal management of the succession by the plaintiff, the withholding by her from the estate of a large sum of money—the proceeds of one hundred and twenty-six bales of cotton; the appropriation to her own use the revenues of a ferry amounting to one thousand or fifteen hundred dollars per annum for the years 1865 and 1866, without accounting to the estate for the same; that she used the lands of the community for years without accounting for the rent. They charge that the plaintiff in injunction never legally administered the estate, and that she accepted the community and is bound for its debts.

Upon the offer of the defendants to introduce evidence to show that plaintiff had concealed and failed to account for money and property belonging to the succession, the plaintiff objected on the ground:



*First*—That such facts, if proved, would be no justification to the defendants in seizing property to which they had no mortgage or claim.

*Second*—Plaintiff having shown her title to the property in dispute her final account and discharge as administratrix of the same can not be attacked collaterally.

*Third*—That all the orders of sale and judgments rendered in regard to the proceedings during the administration of the estate were rendered by a probate court having jurisdiction, and that they can not be attacked in the district court except for causes of absolute nullity, and none are alleged.

The testimony was admitted and the plaintiff reserved a bill of exceptions. To this the judge *a quo* appended his reasons.

That the objection seemed to apply rather to the sufficiency of the proof—proof which might be considered cumulative.

The evidence was upon trial considered, but in no way affected the judgment rendered. It was based solely on the plaintiff's acceptance by purchasing property of the succession at a probate sale, she being forbidden to make such purchase when administratrix, except she be partner in community.

There was judgment rendered in favor of Carroll, Hoy & Co. dissolving the injunction and decreeing that Mrs. E. Wooley pay them one-half the amount claimed by them, with recognition of mortgage on certain lands specified in the judgment, and rendered judgment of non-suit against the defendants on their demand against the minors. From this judgment the plaintiff in injunction has appealed.

The judgment is clearly erroneous. The plaintiff being surviving partner in community had the right to purchase at the sale of the succession. Revised Statutes, section 12; 21 An. 38.

We think the objections should have been overruled. The proceedings in the settlement of the estate seem to have been regularly conducted. A tableau and classification of debts was filed in November, 1866, and homologated in February following by order of the proper court. Upon this tableau Carroll, Hoy & Co. were placed as mortgage creditors for eight thousand five hundred and ninety-one dollars, with interest, from November, 1865. By the tableau other creditors by privilege and mortgage, having superior rank, were put down, and whose claims, it appears, absorbed the funds realized by sale of the property. In March, 1869, the plaintiff filed her final account, which was duly published and homologated, and as administratrix was finally discharged. No opposition seems to have been made by Carroll, Hoy & Co. either to the rank and classification of the debts or to the final account. These proceedings can not, in the form of action adopted by the defendants in injunction, be attacked.

They charge bad faith in the administratrix, but we do not see that

Eliza W. Wooley v. Russ et al.

they have been successful in establishing it. The large sum of money received by her husband in Shreveport for a lot of cotton shortly before his death is not shown to have made a part of his succession, and that it came into the hands of the plaintiff as administratrix. We think the defendants have shown nothing entitling them to relief.

It is therefore ordered that the judgment of the district court be annulled, avoided and reversed. It is further ordered that the injunction be perpetuated, and that the defendants' claim in reconvention be rejected; that there be judgment in favor of the plaintiff, the defendants paying costs in both courts.

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No. 287.—BALL, LYONS & Co. v. R. B. LIGNOSKI.

The remedy by attachment is *stricti juris*, and when invoked to restrain the debtor from selling his property to the detriment of the creditor, proof of a specific act of immorality will not be received to impeach the credibility of the defendant as a witness on the motion to dissolve.

**A**PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. Morrison & Farmer*, for plaintiffs and appellants. *R. G. Cobb*, for defendant and appellee.

**Howe, J.** An attachment was issued in this case against property of defendant on the ground that he was about to convert his property into money or evidences of debt, with intent to place it beyond the reach of his creditors. Rev. C. P., article 240, par. 5.

A motion to dissolve was made by defendant on various grounds. It is urged by plaintiffs' counsel in their elaborate and able argument that the grounds urged do not put at issue the intent of defendant thus to place his property beyond the reach of his creditors. Perhaps a very refined construction might support this view, but the motion was evidently tried in the court below on this issue, and a mass of evidence was received without objection, all tending to elucidate this question and no other, namely, whether the defendant was, at the time of the attachment, really about to convert his property into money or evidences of debt with intent to place it beyond the reach of his creditors.

The judge *a quo* decided this question in the negative, and dissolved the attachment, and plaintiffs on this branch of the case appealed.

We are not prepared to say that the judge *a quo* erred in his decision. In the first place it must be remembered that he saw and heard the witnesses, and so far as there may be any conflict his decision must have great weight and ought not to be reversed unless manifestly erroneous. Again, the affidavit of one of the plaintiffs, though *prima facie* evidence of the existence of the facts therein recited, and therefore authorizing the issuing of the writ and throwing

the onus on the defendant of disproving it in a motion to dissolve, was yet made in New Orleans where the affiant resides, and is evidently not made from any personal knowledge on his part. It is not unfair to presume that he made the affidavit as a formal accusation on information and belief, and it follows that whatever *prima facie* effect it might have could be easily rebutted by defendant, and the onus shifted on plaintiffs to make good a charge affecting the defendant's integrity as a merchant.

It is hardly necessary to remark that the fact that the defendant once dealt or was suspected to have dealt in counterfeit money can have no effect on the decision of this motion to dissolve. The remedy by attachment is *stricti juris*, and especially when issued for the cause set forth in this case, in derogation of the right of disposition of property by its owner, and in opposition to the general interests of commerce.

Proof of a specific act of immorality would not even be received to impeach the credibility of the defendant as a witness on the motion, much less should it be permitted to influence the court upon the question as to whether the grounds of attachment were sufficient.

Judgment affirmed.

Rehearing refused.

No. 307.—SUCCESSION of E. S. VIRGIN—Final account of ROSENFELD, Curator—Opposition of E. M. WILSON, Tutor.

A married woman whose husband is still living is prohibited from contracting a second marriage with another man, and if the man who contracts the second marriage with her has knowledge of the first marriage and that the first husband is still alive, then the second marriage is a nullity, and the children born of such marriage are illegitimate and can not inherit from either party.

**A** PPEAL from the Parish Court, parish of Franklin. *Van Thomas*, Parish Judge. *W. W. Campbell*, for administrator, appellant. *Mores & Crawford*, for opponents.

LUDELING, C. J. This is an appeal from a judgment sustaining the tutor's opposition to the curator's account, and recognizing the minor's right to one thousand dollars, under the act of seventeenth of March, 1852.

The question presented for decision is, whether or not the minors are the legitimate children of the deceased? The evidence shows that their parents went from Louisiana to Arkansas to get married; that they immediately afterwards returned to Louisiana, where they resided until both died. That Mrs. Virgin, at the time of her marriage with E. S. Virgin, had a living husband, and that E. S. Virgin knew this fact. The second marriage was therefore a nullity. Art. 93 C. C.

## Succession of Virgin.

And neither one of the parties being in good faith, the marriage produced no civil effects in favor of the children born of the marriage. C. C. Art. 118, 198.

It is therefore ordered and adjudged that the judgment of the lower court be annulled, that the tutor's opposition be dismissed, and that the account of the curator be homologated. It is further ordered that the appellant pay the costs of appeal.

## ON APPLICATION FOR REHEARING.

In this case our attention having been called to the fact that the appellant was decreed to pay the costs when the judgment appealed from was reversed, we do now order the decree to be amended so as to make appellee pay the costs according to law.

## No. 290.—SUCCESSION OF J. D. and E. C. BAILEY.

Questions of fact not passed upon in the lower court can not be reviewed on appeal, but if such questions appear to be material to a correct decision, then the case will be remanded.

A married woman who resides in Texas may prosecute an appeal from a judgment rendered against her in the courts of Louisiana, and the prosecution of the appeal includes the right on her part to give an appeal bond.

**A** PPEAL from the Parish Court, parish of Franklin. *Van Thomas*, Parish Judge. *J. & S. D. McEnery*, for appellants. *Morrison & Farmer*, for appellee.

HOWELL, J. This is a devolutive appeal taken by three heirs in their own right, and by one alleging himself the tutor of the sole heir of a fourth, from a judgment homologating the final account of the administrator of these two successions, it being alleged in the petition of appeal that a fifth heir had died and the petitioners were his sole heirs; further, that one of the appellants is a married woman residing in Texas with her husband, who aids and assists her herein; and further, that the administrator has died, leaving two children by a first marriage and a widow and two children by a second, who are cited.

A motion is made to dismiss the appeal upon several alleged grounds, which amount to a want of proper parties and a sufficient bond. The death of the two heirs, alleged to have died, and the heirship of the appellants are denied in this motion. These are facts which we can not determine, as they have not been passed on by the lower court, and we have no original jurisdiction of them. It is therefore necessary to remand the case for the purpose of settling them contradictorily between the proper parties. As to the necessity of citing the various creditors, alleged to have been paid, we deem it unnecessary in this case. The account does not propose to distribute any thing among them. It

simply gives the administrator credit for the amounts paid by him, without mentioning the names of the creditors. If he has paid improperly he may be held responsible, but no judgment could be rendered on this appeal against the said creditors for the amounts paid them, or any part thereof, and hence they are not interested in maintaining the judgment appealed from.

As to the representatives of the administrator, it is only necessary to remark that if all of them are not mentioned in the petition, or are not named in their proper capacities, it is incumbent on the appellees to specify the omission or error, it being a matter within their knowledge.

As to the authority of the married woman residing in Texas to appeal and give bond, we think the order of the judge *a quo* sufficient in this case. Article 132 R. C. C. sanctions such order in the absence of the husband. A non-resident is within its purview, and the authority to prosecute the appeal includes the giving of the bond.

It is therefore ordered that this cause be remanded to the lower court to try the questions as to the alleged deaths of two heirs and the heirship of the appellants, and to be otherwise proceeded with according to law, without prejudice to the right of appeal.

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No. 370.—S. RUSS, Tutor, v. L. H. WOODHAM.

In this case the tutor caused a partition to be made among the heirs under an order of court, and took the receipt of the agent of the deceased for the minor's interest in a commercial partnership as a final settlement thereof. A succeeding tutor to the minor brought suit for a settlement of the partnership, alleging that the settlement with the tutrix was only provisional. There was no judgment homologating the first partition with the tutrix.

Held—That the plea of *res judicata* was not good, as there was no judgment homologating the partition, and that the plaintiff therefore had the right to show that the settlement was not complete, or that it was erroneous.

**A**PPEAL from the Tenth Judicial District Court, parish of De Soto. *Levisse, J. Elam & Wemple and Nutt & Leonard*, for plaintiff and appellant. *Scales & Bullock, S. L. Taylor and J. S. Ashton*, for defendant.

This case was tried by a jury in the court below.

HOWELL, J. In January, 1859, L. H. Woodham and H. L. N. Williams formed a commercial partnership in Mansfield, to continue for three years, Williams putting in \$6925 and Woodham \$2000 as capital. In June, 1861, Williams entered the army of the Confederate States, leaving Woodham in charge of the business. In August, 1862, Woodham entered the same army, leaving one L. Phillips in charge as agent. In July, 1863, Williams was killed, leaving a widow and a minor child. The stock of goods and the collections as made were invested by Woodham and Phillips in cotton in various portions of the

neighborhood. On the return of Woodham at the close of the war in 1865, he set about getting the cotton together, and out of some two hundred bales, secured one hundred and sixty-one, which he sold in that year for \$14,635 78 in gold, and made collections to the amount of \$1800 in currency, with which he settled up the debts of the partnership, amounting together with interest to \$25,377, at an average of forty cents on the dollar. In April, 1868, the widow applied to the court for a family meeting to advise as to her suing Woodham for a partition of the partnership assets. The family meeting assembled and advised the bringing of the suit, and in May the tutrix instituted the suit for partition, and upon the order of the court it was made before the parish recorder, and the receipt of the tutrix, dated May 26, 1868, given to Woodham for the portion allotted to the minor, consisting of \$3508 in gold coin and a lot of notes and accounts appraised at \$46 89, as "the full and entire share of said minor in said partnership assets," and a final settlement thereof. The tutrix and under tutor expressed themselves at the time satisfied with the statements made then by Woodham of the partnership accounts and affairs, and taken as the basis of the partition. In February, 1871, the present tutor of the minor instituted this suit for a settlement of the partnership, admitting that the tutrix received under said partition one-half said cash and credits, which had been turned over to him by her; but alleging that the partition was only provisional, because not preceded by a settlement of the individual accounts of the members, each being entitled before partition to withdraw the amount of capital put in, or the proportion according to the state of the individual accounts, the amount coming to the minor at the time being greater than the cash received, and charging the defendant with permitting the credits to become worthless or pre-prescribed and failing to account for all the proceeds of the cotton and profits realized, and praying that defendant be ordered to render a full account, that the partition be declared provisional, or if no preceding settlement be necessary to its validity, then that it be set aside for error, and that defendant pay \$20,000 to the minor as heir of her deceased father.

The defendant pleaded *res judicata*, and answered that the said settlement and partition were final and satisfactory, averring that the sums recovered by the parties respectively and the amount due him as special compensation for services for attending to and liquidating the partnership affairs, made the shares in the assets equal. A verdict and judgment were given for defendant, and plaintiff appealed.

The plea of *res judicata* is not good, as there was no judgment homologating the partition, if the proceeding be considered a judicial partition as contemplated by the Code; and plaintiff has the right to show that the settlement was not complete, or is erroneous.

There is no evidence that the defendant mismanaged the partnership affairs or failed to account for all the assets. On the contrary, we think the above narrative shows that he was faithful, and to a great extent successful in preserving the interests of the partnership. He probably did not keep as accurate an account, of each transaction as prudence might dictate; but in the partition or settlement a liberal spirit was mutually exhibited; and the only practical question really presented in this record is, were the shares of the partners in the assets equal at the date of the settlement in May, 1868? The defendant says they were, because the sums drawn respectively by the partners or their representatives up to that time, and the compensation due him for special services when adjusted, made them equal. He does not give the exact amounts drawn by the parties; but it seems that in order to make the shares equal by this computation, his special compensation is estimated at \$2500. The evidence does not, however, make it justly more than \$1300. There is error, therefore, to the amount of \$1200 (the difference) to the prejudice of the minor, for which she should have judgment.

It is therefore ordered that the judgment and verdict herein be set aside, and that plaintiff, as tutor of the minor Rosa A. Williams, recover of the defendant twelve hundred dollars in full settlement of the partnership between the defendant and H. L. N. Williams, deceased, and costs.

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No. 312.—JOHN G. W. LEWIS v. B. H. DINKGRAVE, Sheriff, and others.

A person holding or claiming a piece of real property under a simulated title can not maintain an injunction against the sale thereof by judgment creditors of his vendors.

**A**PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. Garrett & Garrett*, for plaintiff and appellant. *Morrison & Farmer*, for defendants and appellees.

WYLY, J. The plaintiff, claiming to be the owner, enjoins the sale of the property described in the petition, being a storehouse and a lot of ground in the town of Trenton, and also a stock of goods, seized as the property of J. H. Tatum, by his judgment creditors.

He alleges he bought this property from Tatum on third day of December, 1870, for \$18,000, evidenced by his three promissory notes. The defendants plead the simulation of the sale from Tatum to the plaintiff.

The court gave judgment for the defendants' and the plaintiff appeals. We see no error in the judgment.

From the evidence in the record we are satisfied that the sale from Tatum to the plaintiff was a mere simulation.

It is therefore ordered that the judgment be affirmed, with costs.

**No. 319.—SUCCESSION OF JOHN LILES, SR.—Final Account of C. H. MORRISON, Executor—Opposition of J. H. MITCHELL, Dative Testamentary Executor.**

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If the evidence shows that loss has occurred to the succession by the gross carelessness of the executor, and that his administration, instead of being beneficial, has been injurious to the succession, the executor will not be allowed commissions. 4 An. 578.

To entitle the surviving widow to the one thousand dollars under the homestead act, it must be shown affirmatively that she is in necessitous circumstances.

Suits brought by attorneys before the death of the client may be prosecuted by the same attorneys after his death, notwithstanding one of the attorneys may become his executor, and all the privileges accorded by law on judgment obtained or property seized as security for the attorneys' fees will attach in favor of such attorneys.

An executor who is a professional man is not permitted to charge for legal services which he has rendered the estate while under administration.

**A** PPEAL from the Parish Court, parish of Ouachita. *Robert J. Caldwell*, Parish Judge. *C. H. Morrison* (in person), plaintiff and appellant. *W. J. Q. Baker*, for opponent and appellee.

LUDELING, C. J. This appeal is taken by C. H. Morrison from a judgment on the final account by him rendered under the decree of this court in the case of *John C. Rogers v. C. H. Morrison, executor*.

The appellee has asked for an amendment of the judgment in three particulars, by disallowing—first, the two and a half per cent. on the amount of the inventory claimed as commissions due the executor; secondly, the credit claimed for \$805 alleged to have been paid to Mrs. Liles under the homestead act of 1852; and, thirdly, the amount of \$575 claimed by Morrison & Farmer for fees.

It is admitted that there is an error of calculation in the statement of the accountant of one hundred dollars against himself, and it is evident that the judge *a quo* fell into an error when he added to the debit side of the account the items, amounting to \$381 73, claimed as credits, but disallowed by the judge. The contest thus seems to be narrowed down to the questions presented by the answer of the appellee to this appeal.

*First*—Is the accountant entitled to the two and a half per cent. commissions allowed by law for administering estates?

The accountant avers in his brief that "In this opposition there is no malfeasance alleged or shown. Had there been, and the acts of malfeasance set forth, accountant would have been allowed to and would have shown that his administration had been successful and to the best interest of the estate."

The opposition to this item is in the following words: "The credit claimed—amount of my commissions as executor being two and a half per cent. on amount accounted for, to wit, \$27,404 53, on page seven, amounting to \$685, is opposed; first, because the said Morrison having been removed from his office of executor *for malfeasance* is not entitled to any commissions," etc.



And the accountant further says: "The judgment in the Rogers case decrees no such penalty or forfeiture, and this court can not amend that judgment." The question about the fees of the executor was not before the court in that case, but the question of malfeasance was, and the court held that the executor was "at least so grossly careless" that his removal from office was decreed. And the court further said: "We think it established by the record that the Home place really contained about five hundred and ninety acres, and that its sale for five thousand two hundred and fifty dollars, *if maintained*, would result in a great loss to the estate." 21 An. 457. In the 23 An. 630 it was held that this sale was valid on the ground that Levi, who bought, was in good faith.

It is manifest, therefore, that loss to the estate has resulted "at least from the gross carelessness" of the executor. In the succession of Lee it was held that "when an administration, instead of being beneficial, has been injurious to a succession, the administrator will not be allowed commissions." 4 An. 578.

This is in consonance with equity and the textual provisions of the Civil Code. "The attorney is responsible not only for unfaithfulness in his management, but also for his fault or neglect. Nevertheless, the responsibility with respect to faults is enforced less rigorously against the mandatory acting gratuitously than against him who receives a reward." Article 3003 (2972.)

*Second*—The next item opposed is the claim allowed to the widow under the homestead act. There is no evidence that she was in necessitous circumstances at the death of Liles. The evidence, on the contrary, shows that Mrs. Liles bought the "Reuben Frantom" tract of land for \$3251, and that the price was paid. The executor paid this amount without an order of court, and he has failed to prove that it was a just claim against the estate. The credit claimed for this amount must therefore be rejected.

*Third*—The item for \$575 is claimed for fees due Morrison & Farmer for professional services rendered to the deceased and the succession after his death. They claim that there exists a privilege in their favor for this sum. The facts in regard to the litigation in which the fees are charged are substantially these: During the lifetime of Liles he employed Morrison & Farmer to collect a claim for rent against M. C. Hardy, amounting to about \$1900, with interest. The movable property of the lessee was sequestered in that suit to secure the lessor's privilege. Several other creditors of Hardy, all claiming privileges against the property of Hardy, sequestered as aforesaid, also filed suits against Hardy and intervened in the suit of Liles v. Hardy. After considerable litigation eight hundred and fifty-seven dollars were realized after the death of Liles on his claim for rent against Hardy. The judge *a quo*

allowed \$200 as a fee with a privilege upon the fund realized under the judgment, and the balance of the fee as an ordinary claim. We think two hundred dollars a full fee for prosecuting the claim of Liles and asserting the lessor's privilege on the property sequestered, and that the attorneys had a privilege on the fund realized under the judgment to secure their fees. And we are further of opinion that the fact that Morrison afterward became executor of John Liles, Sr., did not prevent the firm, of which he was a member, from prosecuting suits instituted by them before the death of Liles.

As to the charge for services in the case of *Dowdy v. Morrison*, executor, which was a suit for fifteen hundred and sixty-four dollars, it appears that Morrison & Farmer filed an answer and the plea of prescription, and that the case is yet untried. This item and the other fees charged in favor of Morrison & Farmer are resisted on the ground that Morrison, being executor, could not charge for professional services rendered to the estate. As to Morrison, this position is unquestionably correct. In the case of the succession of Key, the following language is used: "In the case of Baldwin's executor v. Carleton, 15 La. 397, the court virtually adopted the English rule that an executor, who is also a professional man, and renders legal services to the estate he administers, is not entitled to any separate compensation." The reason of the rule is that the best counsel should be selected and employed on the best terms. Judge Martin, in delivering the opinion of the court, remarked that it was the duty of the executor to make such selection; "but it was his interest in this case that he should be employed at all events, and as his conduct has shown, on the very highest terms. In our opinion he succumbed to the temptation." 5 An. 567; 15 La. 399.

There is no evidence in this record to show what services, if any, were performed by Mr. Farmer; or, in other words, to show whether Morrison or Farmer rendered the services charged for, and this constitutes the single difference between the case of the succession of Key and the one now under consideration. In that case it was shown affirmatively that Haskell, the curator, had performed the services for which fees were claimed for the firm of Simon & Haskell. On the authority of the cases of Baldwin's executor v. Carleton and the succession of Allen J. Key, above referred to, and which we approve, we think the fees to Morrison & Farmer for services rendered in matters arising subsequent to the death of Liles, should be disallowed. By correcting the error of calculation made by the executor against himself, and deducting the following sums from the credits claimed, to wit, \$685 11 commissions, \$805 paid Mrs. Liles, and \$375 attorneys' fees, which are disallowed, we find that the accountant owes fourteen hundred and ninety-eight dollars and five cents, with five per cent. per annum interest from this date. C. P. 1097.

It is therefore ordered and adjudged that the judgment of the lower court be annulled, and that there be judgment in favor of J. H. Mitchell, dative testamentary executor of John Liles, Sr., against Charles H. Morrison for fourteen hundred and ninety-eight dollars and five cents, with five per centum per annum interest thereon from this day, and costs of appeal; and that the account rendered be in other respects homologated.

## ON APPLICATION FOR REHEARING.

The counsel for the appellee in this case consented that we might correct any errors in our former judgment without delay or a new trial. We proceed to do so now.

We erred in stating that the item of the account for amount paid to the widow Mrs. Liles was opposed in the opposition to the account.

We were led into the error by the answer of the appellee praying for an amendment in this particular, by the brief of the appellee, and by the silence of the defendant on that point. The *procès verbal* of the sale of the property of the succession shows that the property was sold to Mrs. Liles; but as this item was not specially opposed, we erred in making any change in the account as to that item.

It is therefore ordered and adjudged that our former decree be so amended as to reduce the judgment against Charles H. Morrison to the sum of six hundred and ninety-three dollars and five cents, for which judgment should originally have been rendered, and for which judgment is now rendered.

## NO. 367.—STATE OF LOUISIANA v. SIMON PHELPS and CHARLES BROWN.

An indictment for the crime of murder is sufficiently explicit to advise the accused of the charge against him if it charges "then and there did feloniously kill, slay and murder," without containing the words "with malice aforethought."

**A**PPEAL from the Eighteenth Judicial District Court, parish of Bossier. *Watkins, J. L. B. Watkins*, District Attorney, for the State. *Richard W. Turner*, for defendants and appellants.

Howe, J. The defendants having been indicted for murder, found guilty without capital punishment and sentenced accordingly, have appealed.

The only question raised is in regard to the sufficiency of the indictment. It alleges "that on the first day of November, one thousand eight hundred and seventy, and at and in the said parish of Bossier, one Simon Phelps and one Curry Moas and one Charles Brown, all late of the said parish of Bossier, laborers, then and there did willfully, maliciously and feloniously kill, slay and murder one Julius Williams, in the peace of the State then and there being, contrary to the statute

of the State of Louisiana in such case made and provided, and against the peace and dignity of the same."

The only objection made is that the indictment does not contain the words "of their malice aforethought," or "with malice aforethought," which it is urged are indispensable, and the case of *State v. Heas*, 10 An. 195, and section 1048 of the Revised Statutes of 1870, are relied upon in support of this position.

It is the duty of courts of justice to maintain with care those safeguards of the law in criminal matters which are intended, not for the escape of the guilty, but for the protection of the presumably innocent. And if the words whose absence is here complained of were in any reasonable sense necessary to advise the defendants of the charge against them, and enable them to prepare for their defense or hereafter to plead the proceedings in bar of another prosecution, we should not hesitate to reverse the judgment. But we are constrained to think that the words "with malice aforethought," when used in connection with and in addition to the word "murder," are not only one of those unnecessary prolixities whose use is dispensed with by the statute of 1805 (R. S. 1870, section —), but one of those tautologies which are no more requisite in an indictment than they are pardonable in a literary essay. We need in criminal matters the "justice, mercy and truth" of the common law, and not its "mint, anise and cummin." There is no more need that the State of Louisiana should make vain repetitions in her pleadings than there is that her Christians should make them in their prayers.

The word "murder," used as a verb, implies, of necessity, the idea of malice aforethought. *State v. Forney*, 24 An. 191. When, therefore, the accused in this case were told that they had on a certain day killed and murdered a certain man in the peace of the State, they were distinctly informed that they had "killed a reasonable being in the peace of the State, with malice aforethought, either express or implied." In other words, they were accused of murder, with particularity as to place, time, animus and victim. We must decline to follow the decision in *State v. Heas*.

Nor do we think the statute quoted militates against the view we have felt constrained to take. It declares that it shall be sufficient in an indictment for murder to charge that "the defendant did feloniously, willfully, and of his malice aforethought, kill and murder the deceased." But it does not declare that phraseology less tautological should be insufficient.

Judgment affirmed.

HOWELL, J, *dissenting*. I think the case of the *State v. Heas*, 10 An. 195, enunciates the true doctrine on the subject under consideration, and for the reasons therein given I must dissent in this case.

Cushing v. Robinson, Gervin and Beaird.

No. 362.—WILLIAM L. CUSHING v. G. W. ROBINSON, A. L. GERVIN and  
J. H. BEAIRD.

The act of the General Assembly creating the new parish of Red River and attaching it to another judicial district repealed the former act which rendered its territory subject to the jurisdiction of the Eighteenth Judicial District, and judgments rendered by the Judge of this judicial district, after the passage of this act, are void for want of jurisdiction over the parish.

**A**PPPEAL from the Eighteenth Judicial District Court, parish of Red River. *Watkins, J. Land & Taylor*, for plaintiff and appellee. *Soales & Bullock* and *H. A. Perryman*, for defendants and appellants.

**WILY, J.** The first question to determine in this case is the exception to the capacity of the judge of the Eighteenth Judicial District to hold court in the parish of Red River and to try this cause.

The act of the twenty-seventh of February, 1871, establishing the jurisdiction of the Eighteenth District Court, includes in the district the parish of Red River. This parish was not created till the second day of March, 1871, and the law creating it declares that "said parish shall form part of the Eleventh Judicial District."

This is the law applicable to the case, and whatever is in the previous statute of the twenty-seventh of February, 1871, contradictory therewith, must be considered repealed.

It is therefore ordered that the judgment appealed from be annulled, and it is ordered that this case be dismissed, with costs.

Rehearing refused.

No. 336.—CARROLL, HOY & Co. v. ELIZA W. WOOLEY.

A judgment debtor who seeks to annul a judgment homologating a final account of the administratrix on the ground of fraud must, in order to maintain his action, show the fraud.

**A**PPPEAL from the Parish Court, parish of Bossier. *L. W. Baker*, Parish Judge. *Looney & Ashton*, for plaintiffs and appellants. *J. D. Watkins*, for defendant and appellee.

**LUDELING, C. J.** This is an action to annul a judgment homologating a final account made by the defendant as administratrix of the succession of Samuel Harrison, on the grounds of fraud, error and want of notice to the creditors.

The plaintiffs have failed to make out their case. In the case of *Wooley v. Russ, sheriff et al.*, which was a suit between the same parties who now contest in this cause, the same questions were substantially presented, though in another form of action. In that case we said: "They charge bad faith in the administratrix, but we do not see that they have been successful in establishing it. The large sum

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 Carroll, Hoy & Co. v. Eliza W. Woolley.
 

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of money received by her husband in Shreveport for a lot of cotton, shortly before his death, is not shown to have made a part of his succession, and that it came into the hands of the plaintiff as administratrix." And the failure to account for this sum of money is the principal ground upon which the charge of fraud is based. We see no error in the judgment appealed from.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed, with costs of appeal.

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No. 349.—J. W. BOSWELL v. SUCCESSION OF R. R. ROBY, deceased.

Any acknowledgment or agreement equivalent to an acknowledgment of a debt by a person who is dead at the time it is sought to be established, must be proved by written evidence.

**A**PPEAL from the Tenth Judicial District Court, parish of Bossier. *Watkins, J. Egan, Williamson & Wise*, for plaintiff and appellee. *Griffin & Snider*, for defendant and appellant.

HOWELL, J. This suit is brought on the following note:

"\$2465 22. By the first day of January, 1860, I promise to pay John W. Boswell the sum of two thousand four hundred and sixty-five dollars and twenty-two cents, for value received.

(Signed)

"R. R. ROBY."

"December 17, 1858."

The defense is a general denial and the prescription of three, five and ten years. To show a suspension of prescription the plaintiff offered a written receipt of plaintiff of the same date of the above note, and the depositions of three witnesses, to prove that the note sued on should not be exigible until another described in the said receipt, and made by one John T. Howard in favor of R. R. Roby, the deceased, should prove to be uncollectable, and that the latter note was really a collateral to secure the payment of the one sued on. To these depositions the counsel for the succession objected on the grounds:

*First*—"Because it was an effort to prove by parol a different and distinct contract from the one sued upon, and was an effort to contradict and vary by parol the written contract sued upon—the contract sued upon being absolute, and the one sought to be established by the evidence offered being a conditional contract."

*Second*—"Because it is an effort to prove by parol evidence an acknowledgment or promise of a party deceased to pay a debt in order to take such debt out of prescription and to revive the same after prescription had been completed."

These objections were sustained, but "the evidence offered was admitted, with the restriction that it was to be considered only in so

far as it might tend to prove in the possession of plaintiff collaterals for the security of defendant's debt, as a means of establishing thereby the suspension of prescription in the interim."

Under this ruling all parol evidence tending to change or vary the contract sued on, or to show a verbal agreement different from that reduced to writing by the parties, was excluded, and we think correctly; and with the restriction under which it was admitted the evidence does not establish a suspension of prescription as held by the judge *a quo*.

The receipt is in the following words:

"Received of R. R. Roby his note for two thousand four hundred and sixty-five dollars and twenty-two cents, due on the first day of January, 1860, which note is in my hands as collateral security for a note of the same amount on John T. Howard, due at the same time said note on Howard, dated October 9, 1858.

(Signed)

"JOHN W. BOSWELL."

"December 17, 1858."

This receipt declares that the note of Roby, now in suit, was taken as collateral security for the Howard note, and as long as it might have been kept in vigor in the possession of the creditor it would operate a suspension of the prescription of the Howard note; but its possession, as it was held, did not interrupt or suspend its own prescription. The plaintiff did not object or reserve a bill to the limitation put upon the admission and consideration of the evidence; and giving the only legal effect it can thus have, it does not prove a suspension of prescription as to the note in suit by the possession by plaintiff as collateral security. For to show that the Howard note was held as security there must be evidence of a different agreement from that declared in the receipt, and the only evidence on that point was excluded by the judge *a quo*. But if it be conceded that the ruling of the judge be viewed as admitting the said depositions to prove an original acknowledgment or agreement at the date of the transaction—the effect of which is to suspend prescription—then we must hold it obnoxious to the second ground of objection. Any acknowledgment or agreement equivalent to an acknowledgment of a debt by a person who is dead at the time it is sought to be established must, under the law, be proved by written evidence.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of defendant, with costs in both courts.

Howe, J. I concur in the decree in this case for the reason lastly given in the opinion of the court. A continuous acknowledgment by a deceased person of a debt can not be proved by parol.

Rehearing refused.

No. 107.—J. T. SWAN v. ANN L. GAYLE, Administratrix—AMANDA J. KNOX et al., Intervenors.

The right given by law to the vendor to have the sale dissolved on the failure of the purchaser to comply with the terms thereof, by paying the price stipulated, is not transferable, and does not pass with the transfer of the notes or obligation of the purchaser held by the vendor. In such a case only the right of the vendor to enforce the payment of the notes with the securities, passes to the indorsee, but not the right to rescind or disturb the sale itself.

**A**PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. Richardson & McEnergy*, for plaintiff and appellee. *Garrett & Garrett*, for defendant (administratrix), appellant. *Morrison & Farmer*, for intervenors.

WYLY, J. In July, 1859, H. Filhiol sold to W. H. Gayle the house and lot in Monroe, described in plaintiff's petition, for \$6050, evidenced by the three promissory notes of the latter, made part of the petition, and also another note for \$2000, which has been paid.

The plaintiff, the indorsee of said notes, sues the defendant, the administratrix of the succession of the vendee, to dissolve the sale for non-payment of the price. The court ordered the defendant to pay the price within the time fixed in the decree, and in default thereof ordered the dissolution of the sale as prayed for.

From the evidence we are satisfied that the notes evidencing the obligation of the buyer have not become prescribed.

The main question in this controversy is, can the resolution of the sale be demanded by the indorsee of the notes representing the unexecuted legal obligations of the buyer?

We think that it can.

The owner of the notes owns the unexecuted obligation of the buyer with all the securities and remedies provided by law for its enforcement.

The conveyance of perfect ownership by the seller and the delivery of the possession, completed the execution of the contract of sale on his part; the corresponding obligation of buyer was deferred till the maturity of the notes. His engagement was to pay the price or restore the thing. The performance of the one or the other, the express or the implied condition, would discharge the legal obligation on his part. The decree dissolving the sale executes the contract as fully as the decree ordering the payment of the price.

Whether the express or the implied condition be performed by the buyer is immaterial; the performance of either consummates his engagement.

"If the buyer does not pay the price the seller may sue for the dissolution of the sale." R. C. C. 2561. Why? Because, taking the thing upon two conditions—the one expressed to pay the price, the



other implied to restore the thing—he is liable to be pursued by the seller for a compliance with either condition after being in default for the price. As security for the obligation of the buyer, the seller may demand the price with the vendor's privilege on the thing sold, or he may demand the restoration of the thing itself.

These are the remedies provided by law for the enforcement of the obligation of the buyer.

The vendor's right to pursue either remedy does not result from an obligation personal to himself; it is only because he is the owner of the obligation of the buyer.

The owner of a legal obligation is necessarily clothed with all the remedies provided by law for its enforcement.

It would be absurd to say that the owner of a legal obligation does not own the remedy or remedies provided by law to compel its execution. Having the legal right, he owns the corresponding legal obligation of the buyer, whereby is imposed on the latter the juridical necessity of performing or discharging that right or duty in the manner provided by law. The duty of the buyer may be discharged by payment of the price or by restoration of the thing; and the only person who can invoke the law to compel this discharge of duty is the party owning the obligation. He alone is aggrieved where the buyer is in default for the price; and he alone has cause to complain.

We think the right and the remedy or remedies are inseparable.

The right to compel the performance of the obligation in the case before us belongs to the plaintiff as the owner of the notes, evidencing the unexecuted obligation of the buyer, and he has the right to ask the intervention of the State to compel its performance. He may demand the application of the remedies of the law in such cases made and provided.

In *George, curator, v. Lewis*, 11 An. 655, this court said: "The dissolution of a commutative contract for non-compliance by either party with his engagements is really the carrying into effect of a part of their convention, either express or implied. \* \* \* The plaintiff might have sued successfully for the price and claimed the vendor's privilege on the land. He resorted to a concurrent remedy by demanding the dissolution of the sale," etc. See also the authorities cited in that case.

The character of the dissolving condition was determined by this court as early as 1824, and the correctness of the ruling has not since been questioned. *Torregano v. Segura*, 2 N. S. 159. In that case where the surety of the buyer for the price of a slave paid the debt and sued the syndic of the latter to dissolve the sale, on the ground of legal subrogation existing in his favor, whereby he became entitled to pursue the same remedy as the vendor, it was urged in defense "that

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although the plaintiff as indorser was bound *in solido* with the vendee, he is nevertheless a third party as regards the contract, and does not become subrogated to the rights of the vendor (the right to dissolve the sale) unless this be expressed in a notarial act at the time of the payment. C. C. 288, 150.

Further, that without this formal subrogation the plaintiff could not have an *apparajada* execution, because there would be no transfer of the judgment which the act of mortgage imports; neither can he bring the action of rescission, because he is not a party to the sale, and were it rescinded, the title would revert to the vendor, so that the plaintiff could have no benefit thereby." The court decided through Judge Martin, its organ, that "the subrogation is of the right of the creditor, not against the debtor only, but also against the securities, C. C. 188, 149 and 152, and like a transfer of a debt, it includes everything which is accessory thereto, as suretyship, privileges and mortgages. C. C. 368, 124.

"The rescission of the sale is a means of securing the payment which the vendor, the creditor of the price, has. This right is an accessory of the claim, and would pass by the sale or transfer of it. The subrogation has, in our opinion, the same effect."

Now, as there is no doubt that the plaintiff owns the claim or debt evidenced by the notes, it follows that he also owns the accessory right or remedy of resolution appertaining thereto, and it passed to him by the indorsement of the notes.

As to the argument that the plaintiff can not demand the dissolution of the sale, because he was a third party, and were it dissolved the title would not vest in him but in the vendor, so that he could not be benefited thereby, we will remark that was the ground taken in the case decided in 1824, and Judge Martin attached but little importance thereto, and we entirely concur in his conclusion.

Whether Gayle was insolvent or not could not defeat the resolatory action. This was also made a point, without effect, in *Torregano v. Segura's Syndic*, to which we have referred. The dissolving condition was not lost by failure to reinscribe the mortgage within ten years. 12 An., *Johnson v. Bloodworth*, 699, and authorities there cited.

There is no force in the plea of the prescription of ten years, *acquisitendi causa*. The buyer in default for the price can not urge that defense to the enforcement of the unexecuted obligation lying at the foundation of his title. As long as the obligation of the buyer subsists and may be enforced in either the modes provided by law, he will not be heard pleading his possession of ten years in bar of the enforcement of the condition on which he acquired that possession. His title, as to his vendor, was not indefeasible as long as his legal obligation to pay the price subsisted. As to the failure of the plaintiff to offer to restore

the installment which he received before demanding the resolution of the sale, we will observe that the record furnishes ample evidence of a sufficient offer. Only one of the notes was liable to the plea of prescription of five years, and that was waived by Gayle in 1867, the waiver being indorsed on the notes.

The other defenses are not of a serious character.

It is therefore ordered that the judgment appealed from be affirmed with costs.

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LUDELING, C. J. I concur in the decree in this case, on the authority of *Torregano v. Segura*, 2 N. S. 159.

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HOWE, J., *concurring*. The question whether the transfer of a note given for the price of lands carried with it to the transferee the right to dissolve the sale, is not free from difficulty. I think, however, it was decided in the affirmative in *Torregano v. Segura*, 2 N. S. 162, and we are under no obligation to reopen the discussion. I concur in the decree affirming the judgment of the district court.

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HOWELL, J. Not being able to concur in all the views expressed by the majority of the court in this case, the right to file my own at a subsequent date is reserved to me by the court.

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#### ON REHEARING.

LUDELING, C. J. This is a suit for the dissolution of a sale for the non-payment of the price.

On the eighteenth of July, 1859, H. Filhiol sold a house and lot in the town of Monroe to W. H. Gayle for \$6050, for which four promissory notes were executed—one due January, 1860, for \$2000, and three others each for \$1350, due on the first of March in the years 1861, 1862 and 1863. The first of these notes was paid by Gayle, and the other three were transferred to Joseph T. Swan by the following indorsement on the back of each: "Without recourse, H. Filhiol." On the ninth of February, 1867, suit was instituted against the succession of Gayle by the plaintiff in this suit for the amount of the three notes held by him, which was dismissed for want of jurisdiction *ratione materiæ*. 21 An. 478. And then this suit was instituted, after first procuring from Filhiol what the plaintiff calls an act of subrogation, which recites that he had "heretofore transferred and delivered to J. T. Swan" the said notes, and that "it was his intention to transfer to him, with said notes,

all the rights said Filhiol had against Gayle growing out of said purchase of the above property from Filhiol, and not only subrogate said Swan to all his (Filhiol's) rights in and to said notes and the mortgage and privilege to secure their payment, but also to said Filhiol's right to have the sale set aside for the non-payment of the price," etc. This act was passed on the fourth of September, 1869, about two years after the transfer of the notes to Swan. To the reception of this document the defendant objected, on the grounds that it was *res inter alios acta*; that it was an attempt to introduce in evidence against him the unsworn declarations of Filhiol, and without affording him an opportunity to cross-question him; and that it was an attempt to contradict, vary and explain the transfer in writing on the back of the notes. These objections, we think, should have been sustained. 22 An. 322; 23 An. 589, 445. But if the act were properly in evidence it would not materially change the facts. Filhiol could not subrogate Swan to anything which did not pass at the date of the sale of the notes. 5 R. 207; 19 R. 477; C. C., article 2160.

The questions presented for solution in this case are important, and two of them we think have never been directly decided by this court, to wit: Whether the right of the vendor to dissolve the sale for the non-payment of the price can be sold by him, and whether that right is an accessory to the notes evidencing the unpaid price? We do not deem it necessary in this case to pass upon the first question, as there evidently was no sale of this right, unless it passed to Swan as an accessory to the notes acquired by him. Two cases have been referred to in which expressions are used by this court which would indicate that the court considered that right to be an accessory of the notes. In *Torregano v. Segura*, 2 N. S. 158, the court said: "The rescission of the sale is a means of securing the payment of the price, which the vendor, the creditor of the price, has; this right is an accessory of the claim and would pass by the sale or transfer of it." In the case of the *Citizens' Bank of Louisiana v. Cuny and others*, the court said: "The vendor's privilege gives to the vendor, in addition to the right to have the property sold to pay the price, a rank in relation to other creditors of the vendee which he might not otherwise have. It confers upon the vendor a right to the rescission of the sale on the non-payment of the price." 12 R. 281. In both cases, however, the expressions were used *arguendo*. The question before the court for decision in those cases did not require the decision of this point. In the latter case the only question presented was whether the cancellation of a special mortgage given to secure the payment of notes for the price for lands destroys the vendor's privilege to secure said notes.

In the case of *Segura* there was no sale or transfer of a note or credit. The surety who had signed the notes with the vendee, and

who had paid the notes, asserted by that law he was subrogated to all the rights of the vendor.

On the other hand, in the case of *Johnson v. Bloodsworth*, the court used the following language: "But it is impossible to confound the resolutive action with the vendor's privilege. The former is not a mere appendage of the latter." 12 An. 699. And this also was said *arguendo*, for the question before the court was: "When the vendee of a slave, holding by private act unrecorded, has mortgaged the slave to a third person by public act duly registered, can the unpaid vendor enforce the implied condition against this vendee to the prejudice of the mortgage creditor of the latter?"

These expressions ought not to be regarded as authoritative, and we will treat the question as a new one not adjudicated upon by this court.

"The sale or transfer of a credit includes everything which is an accessory to the same." C. C. 2645. "A principal contract is one entered into by both parties on their own accounts, or in the several qualities they assume. An accessory contract is made for assuring the performance of a prior contract, either by the same parties or by others; such as suretyship, mortgage and pledge." C. C. 1771. The accessory obligation or right, then, is something which may aid to enforce the principal obligation; if the principal obligation is extinguished the accessory right ceases to exist also.

The action for the resolution of the sale implies and presupposes the renunciation of the right to demand the payment of the price. "If the buyer does not pay the price, the seller may sue for the dissolution of the sale." C. C. 2561.

"Now, a right which can not exist so long as another right exists, can not be an accessory of the latter."

Mr. Marcadé says:

"Loin que le premier droit soit l'accessoire du second il ne coexiste même pas avec lui, il ne lui est pas concomitant, il ne prend naissance qu'après que celui-ci a cessé d'exister: la demande en résolution implique et présuppose la renonciation au droit de demander paiement, la renonciation à la créance; ou, un droit qui ne peut pas exister tant qu'existe un autre droit ne peut certes pas être l'accessoire de celui-ci."

Marcadé, vol. 6, p. 334, commenting on article 1692 Mr. Duvergier says, No. 222, p. 259:

"Que le vendeur payé en billets, en transmettant ces billets à un tiers, lui cède le droit d'exiger le paiement et aussi le privilège; c'est-à-dire, le droit d'être payé par préférence, mais ne lui cède pas l'action en résolution de la vente, parce que cette action n'est pas l'accessoire du droit d'exiger le paiement; elle suppose, au contraire, le non-paiement."

What did Filhiol sell to Swan? Three notes with the accessory

rights of mortgage and vendor's privilege to enforce their payment—nothing else. And Swan acquired no other right from Filhiol than such as are necessary to enforce the payment of those credits or debts. The right attempted to be exercised in this case is certainly not to collect those notes.

Suppose Filhiol had sold the property for less than half its value, could it be pretended that in buying the notes given for the price Swan acquired Filhiol's right to rescind the sale for lesion beyond moiety? He did not buy all the rights of the vendor resulting from the contract of sale to Gayle, but only the notes with their accessories. He did not by buying the notes take the place of Filhiol in the contract of sale, else the purchaser of a negotiable note, given for the price of property, would become the warrantor of the title to the property. A proposition which leads to such an absurd conclusion ought not to be sustained by a court of justice.

This view of the case renders it unnecessary to pass upon the questions of default, tender and prescription raised in this case.

It is therefore ordered and adjudged that the judgment of this court heretofore rendered in the case be set aside, that the judgment of the court *a qua* be reversed and annulled, and it is decreed that there be judgment in favor of the defendant rejecting the plaintiff's demand, with costs of both courts.

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WYLY, J., *dissenting*. I adhere to the former opinion of this court in this case. The right to dissolve the sale is either a principal or an accessory contract. It must fall in the one or the other of these classes. So far as the result of this case is concerned it is immaterial under which class the court places it.

If it is an independent or principal contract it can be transferred, separate from the notes, at any time the owner sees fit to do so. It is only accessory contracts that must pass by subrogation at the time of the transfer of the principal contract. By the notarial act of the fourth of September, 1869, Filhiol declares that at the time he transferred the notes to Swan he intended not only to convey the notes and the mortgage and privilege to secure the payment, "but also his (Filhiol's) right to have the sale set aside for non-payment of the price." Here, then, in September, 1869, Filhiol transfers or donates, under the form of a sale, his independent right or contract (if such it may be called) to dissolve the sale. Yet the court rules out of the evidence the notarial act showing the transfer of what the court in the latter part of its opinion practically treats as an independent contract.

If the right to dissolve the sale be an independent contract, and the finding of the court rests upon no other hypothesis, the transfer by

authentic act of that independent right or contract was admissible, the lower court did not err in receiving it, and this court erred in ruling it out on this rehearing. In other words, in my judgment, this court ruled out the transfer of September 4, 1869, on the hypothesis that, being an accessory contract, it should have been made at the time of the transfer of the notes; and then turned round and decided against the enforcement of the dissolving condition on the hypothesis that it was not an accessory contract, but an independent contract which had not been transferred.

I repeat, that if the right to dissolve the sale be an independent contract, the transfer thereof by authentic act in September, 1869, was permissible, and the court had no right to rule out this authentic evidence of the transfer, unless the court should hold that this right is not transferable. I hardly imagine that a contract of this character will be considered personal and not transferable. This right is property, and all property is transferable, except such as is by law excepted from the general rule; that the right of disposition or the right to sell is essential to perfect ownership.

Therefore, if the right in controversy is an independent right which the owner could transfer at any time, the plaintiff, the transferee of that right under the notarial act of September 4, 1869, can enforce it.

But if the right to dissolve the sale be an accessory right or a remedy incident to the principal contract of sale, as I believe, the plaintiff, the owner of the obligation, can enforce it without an act of transfer or an act of subrogation. Now, the rule that "a right which can not exist so long as another right exists, can not be *accessory* to the latter," has no application to this case.

The right to dissolve the sale exists from the beginning or the date of the sale, but it does not become exigible till the debtor of the contract is in default for the price.

The accessory contract of warranty exists from the day of the sale, because of the nature of the contract, yet it is not exigible and never becomes so till the eviction of the purchaser occurs.

The right to dissolve the sale is, in my judgment, an incident of the contract of sale; it is an accessory contract with a suspensive condition; but a perfect and complete one from the date of the sale, notwithstanding the suspension thereof.

I can not agree with the organ of the court that what was said by Judge Martin in *Torréano v. Segura*, 2 N. S. 159, was merely *argu-ende*, expressions not necessary to the decision of the case, and therefore not authoritative. The decision speaks for itself. Upon the basis that the dissolving condition is accessory to the principal contract of sale the court held that the plaintiff, the surety, who paid the debt became subrogated thereto, became the owner of the debt, the creditor

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of the contract, and as such acquired with it all the accessory rights, including the right to dissolve the sale.

For these reasons and those stated in the first opinion rendered by this court in this case, I respectfully dissent from the views expressed by the majority of the court.

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Howe, J. In my opinion our decree should remain undisturbed. By the transfer of the notes and the special assignment of Filhiol's rights as vendor (both of which were subjects of transfer) the plaintiff became vested with all the rights of the original vendor. Duvergier's Toullier, vol. 17, 275, citing Sirey 26, 2, 189; Dalloz 26, 2, 156; Sirey 23, 2, 57; Rogron's C. N. 1692; Paillet's C. N. 422; Lahaye's C. N. 1692; Torregano v. Segura, 2 N. S. 158.

There is no question of subrogation in the case, either legal or conventional, for there has been no payment, and without payment there can be no subrogation. Rogron's C. N. 1248, 1249 and 1250; C. C. of 1825, articles 2155 and 2156. The case is governed by the rules in regard to sales.

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No. 327.—G. & H. KING, in liquidation, v. F. E. BOWMAN.

In a proceeding by the hypothecary action against a third possessor of mortgaged property, who holds it under a sale made by the assignee in bankruptcy, the putting in default is unnecessary.

The proceeding by the hypothecary action to enforce a mortgage on property which has been surrendered in bankruptcy is not a bankrupt proceeding, and the State courts have jurisdiction to enforce such action.

A mortgagee does not lose his rights of mortgage on property by participating in the bankrupt proceedings, such as voting for an assignee, etc., nor does the sale made by the assignee divest the mortgagee of his right to pursue the property in the hands of the purchaser by the hypothecary action. In such a case the bankrupt court only passes such title as the bankrupt himself could pass.

**A**PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. Stubbs & Cobb*, for plaintiffs and appellants; *Morrison & Farmer*, for defendant and appellee.

Howe, J. This is an hypothecary action commenced by plaintiffs to enforce their judicial mortgage, resulting from the record of a judgment obtained by them against W. S. Grayson, in the office of the recorder of mortgages of Ouachita parish, on the seventh of April, 1866, for the sum of \$5706 30, with interest at eight per cent.

Plaintiffs allege that at the time of said record, Grayson, their judgment debtor, was in possession and ownership of a tract of land containing seven hundred and three and ten one-hundredth acres, situated in Ouachita parish, and that their judicial mortgage attached thereto.

They also aver that defendant is now owner and possessor of said land through a chain of title, set forth in petition.



It is also alleged that the judgment debtor, Grayson, made a voluntary surrender in bankruptcy in August, 1869, and that the land was surrendered by him.

Appellants contend that their mortgage on said land has never been divested by any of the conveyances by which it came into the hands of the defendant, and this suit is to enforce their hypothecary right for the amount of their debt.

Defendant Bowman filed an exception, alleging he had not been put in default, and that no allegation of demand and notice was contained in petition.

This exception was overruled, and defendant filed his answer, calling his vendor, W. G. Kennedy, in warranty, and pleading general denial.

Kennedy, Bowman's vendor, appeared and filed an exception that the State courts have no jurisdiction in a suit to enforce mortgages on property that has been surrendered in bankruptcy; that the United States District Court has exclusive jurisdiction.

He answers over and alleges that plaintiffs abandoned and forfeited their judicial mortgage on the land described in petition, by having proved their claim and participated in the election of an assignee before the register in bankruptcy; and he calls W. W. Farmer, his vendor, in warranty.

Farmer answered the call, and set forth the grounds in his answer why the call should be dismissed, and on motion of Kennedy's counsel there was a judgment of non-suit on the call. There was judgment in favor of defendant and warrantor, and plaintiffs have appealed. The defendant also appealed, to preserve his rights against the warrantor.

G. & H. King obtained judgment against W. S. Grayson, in Twelfth District Court of Ouachita, on the seventh of April, 1866, for \$5706 30, with eight per cent. interest; on \$3468 23 from twenty-sixth of April, 1861; on \$1818 89 from first of July, 1862, and on \$419 18 from first of January, 1866. A copy of this judgment was recorded in the book of mortgages on same day.

Grayson paid on the first of October, 1866, \$621 41, and is credited with this amount. Grayson was the owner of 710 3-100 acres of land in Ouachita parish, after the seventh of April, 1866, to which the judicial mortgage of plaintiffs necessarily attached between the time of its record and the time of his surrender of the land in bankruptcy, thirteenth of August, 1867.

Grayson was duly adjudicated a bankrupt, and a warrant to the messenger in bankruptcy was issued. G. & H. King were placed on the schedule of Grayson as creditors, secured by judicial mortgage on the land surrendered.

Notice was served on them (G. & H. King) by the messenger to attend the first meeting of creditors for the purpose of electing assignees.

G. & H. King proved their claim by affidavit before W. J. Q. Baker, register, on thirtieth of September, 1867, under form 21 prescribed by the Supreme Court of the United States—their debt exceeding the value of their security—and attended the first meeting of creditors of the bankrupt, held on that day, and voted for J. Hoffman as assignee. There was no choice by creditors, and the register appointed Warren G. Kennedy assignee, and he accepted the trust. This was the last appearance of plaintiffs in the bankruptcy proceedings of Grayson.

The register made the deed of assignment required by law on the first of October, 1867.

Kennedy gave the required notice of his appointment by advertisement on October 1, 1867, and on the ninth of November, 1867, without any order of the bankrupt court, he advertised the 710 3-100 acres of land for sale on the seventh of December, 1867; and on seventh of December the land, without order of court, was sold to W. W. Farmer, at auction, for \$1075, and title deed executed on the tenth of December, 1867. On the same day Farmer made a title to Kennedy of this same property, excluding warranty, except as against his own acts.

The consideration of this sale from Farmer to Kennedy was a judgment obtained in the Second District Court of Texas by Kennedy v. C. H. Morrison, for the sum of \$5829 87, with five per cent. interest from thirteenth of September, 1866, transferred by Kennedy to Farmer.

On the twenty-eighth of December, 1869, Kennedy sold this land to Bowman, the defendant and third possessor, against whom this action is brought, for the sum of \$14,000.

It appears from the assignee's account that the bid of Farmer, \$1075, and \$42 25 from sale of personal property, was all that was realized from the bankrupt estate, amounting to a balance of \$904 22 after paying costs. The register ordered the assignee to pay \$787 41 of this amount to C. H. Morrison, the oldest judgment creditor of the bankrupt, and the balance, \$116 22, to Byrne, Vance & Co., the next in rank.

I. The plaintiffs in this hypothecary action were clearly dispensed from the necessity of demand and notice, as provided by act 69 of the Code of Practice, by the bankruptcy of Grayson. Not only was he insolvent, but proceedings against him had been stayed. A demand on him and a notice of such demand to Bowman would have been a vain ceremony to which the law compels no one. *Cummings v. Erwin*, 15 An. 289. This consideration disposes of all preliminary technical questions in the case.

II. There is no force in the exception to the jurisdiction of the

court *a qua*. This is not a proceeding in bankruptcy, nor an action against property under administration by the bankrupt court, nor a suit against a person under the protection of that court. The fact that the land on which plaintiffs seek to enforce their hypothecary right was once sold by an assignee in bankruptcy leads in this case to an interpretation of a law of the United States, and may lead to an appeal to the Supreme Court of the United States, but it does not deprive the State tribunal of jurisdiction.

III. An assignee in bankruptcy may sell, without petition to or order of the bankrupt court, any property of the bankrupt incumbered in any manner. But when he so sells, he sells subject to any and all lawful incumbrances, and can convey no better or higher interest than the bankrupt could have done. It will be taken for granted that he sold only such right or title to the property as was vested in him, and therefore sold it subject to the incumbrances. The sale in this case by the assignee was of this sort.

But the appellees contend, as the main point in the case, that the appellants, by proving their claim and voting for an assignee, abandoned and forfeited their judicial mortgage, and reduced themselves at once to the rank of ordinary creditors.

No one is easily presumed to give up a right, especially of preference, by way of mortgage or lien on the property of an insolvent. The present bankrupt law seems intended to carefully preserve such rights. If a secured creditor prove his claim as unsecured, without apprising the bankrupt court of the existence of his lien, he has been held to waive that lien, relinquishing it to the assignee. *Stewart v. Isidor*, 1 B. R. 129. *In re Bloss*, 4 B. R. 37—Bump's Treatise, p. 79. But in this case, under form 21, for the proof of debt with security, the plaintiffs, as thereby required, set forth with particularity their mortgage, the property on which it bore and the estimated value of such property. It has been held that proof of a secured claim under this form does not invalidate the right of the creditor to his lien. *In re Bigelow*, 1 B. R. 186; *in re Snedaker*, 3 B. R. 155—Bump's Treatise, p. 80. And this seems to be reasonable, and to have been the view of the justices of the United States Supreme Court who prepared these forms. Why should a creditor who expressly claims a mortgage be held to have thereby impliedly abandoned it? Why should form 21 require a creditor to make a statement of his lien, the property on which it rests and the value of the property, if the effect of the use of such form should be to forfeit that lien? We can hardly imagine that form 21 was devised as a trap and pitfall. It was doubtless meant to be used as a step in the process by which the secured creditor, under section 20, may negotiate with the assignee for the property itself, in case it exceed in value his debt; or in case the debt exceed the value

of the property, he may be admitted as an ordinary creditor for the amount of such excess.

Nor can we perceive that the fact that plaintiffs voted at the election of the assignee ought in reason to be construed into an abandonment and forfeiture of their mortgage. It has been held that a secured creditor has no right to vote; but it has been held by equal authority that he has. *In re Bolton*, 1 B. R. 83. We do not see why he should not vote, at least to the extent of his debt over and above the value of his security. This excess may be as well established by the oath of such creditor as an ordinary debt by the oath of an ordinary creditor.

The secured creditor has as much interest in the choice of an assignee as any other person whom the bankrupt owes. In some cases it might be of greater interest to him than to the ordinary creditor that the administration should be honest and skillful.

But we will suppose the plaintiffs had no right to vote. Shall their erroneous exercise, by the neglect of the register or the other creditors, of a right which did not belong to them of voting, deprive them of another and distinct right which did belong to them? We think not. Their mortgage, considered from the point of view of the civil law, is a legal obligation. As such it may be extinguished by voluntary remission; but voluntary remission ought to be established with legal certainty. The gratuitous abandonment of an acquired right is never presumed. *Green v. Foubene*, 2 An. 958; *Saul v. Nicolet*, 15 La. 250.

It is therefore ordered that the judgment appealed from be reversed; that the plaintiffs have judgment in their favor, recognizing and rendering executory their judicial mortgage on the lands described in the petition herein, for the sum of five thousand seven hundred and six dollars and thirty cents, with eight per cent. interest per annum on the sum of \$3468 23 from April 26, 1861, and the like rate of interest on the sum of \$1818 89 from the first day of July, 1862, and the like rate of interest on the sum of \$419 18 from the first of January, 1866, subject to a credit of \$621 41 paid on the first of October, 1866. That the said defendant F. E. Bowman be decreed and condemned to pay said debt, interest and costs, or deliver up said lands described in said plaintiffs' petition, to be sold to satisfy said debt, interest and costs.

It is further ordered that the defendant F. E. Bowman have and recover over against his warrantor W. G. Kennedy judgment for the same amounts hereinbefore decreed in favor of plaintiffs.

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HOWELL, J., *dissenting*. In my opinion plaintiffs made themselves parties to bankruptcy proceedings by proving up their claim and participating in the election of an assignee; and, being as parties bound by the subsequent proceedings authorized by law, their mortgage

attached to the proceeds of the property affected by it when sold, and the property passed to the purchaser free of incumbrance. It was in their power to attend the sale and make the property bring a full price.

I can not concur with my associates in their conclusion in this case. Rehearing refused.

No. 357.—ANN J. HAVARD and Husband v. MARY B. ATKINS and Husband.

A patent that has been issued by the Governor of Louisiana through error, for public lands within the State, can not be made the basis of an action of slander of title against the owner, who holds the same land under an entry previously made at the land office of the United States.

**A**PPEAL from the Eighteenth Judicial District Court, parish of Bossier. *Watkins, J. J. D. Watkins*, for plaintiffs and appellees. *J. R. Griffin*, for defendants and appellants.

HOWE, J. This is an action of slander of title, the plaintiffs alleging and proving possession of and legal right to the land, and the defendants justifying under the plea of a title superior to plaintiffs'.

The defendants therefore necessarily occupy the position of plaintiffs in a petitory action, because they are not in possession, but set up a title superior to that of the persons in possession.

The cause was tried by a jury, and a verdict having been rendered for plaintiffs, and a judgment given accordingly, the defendants appealed.

The defendants, on whom the onus rested under the circumstances of this case, claimed title in virtue of a patent not produced, but admitted to have been issued by the Governor of Louisiana in 1861.

It was claimed on the other hand by plaintiff, and we think with force, that this patent was issued in evident error. The land in dispute was entered by John M. Fuller in November, 1852, as swamp lands donated by the United States, and John M. Fuller took possession, and by his will donated the same to the plaintiff Ann J. Havard. This entry was never canceled, and we can only conjecture that the patent was issued by mistake, perhaps in the confusion of the late war. *Kittredge v. Breaud*, 4. Rob. 79.

We see no force in the objections of defendants to testimony offered by plaintiffs. The sworn and examined copy of the certificate of Fuller's entry annexed to the testimony of the officer who had the custody of the records, was properly admitted, and was quite as good as a certified copy, if not better. It was not an attempt to prove title by parol; nor was it the introduction of secondary evidence without accounting for the original.

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49 1661

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Ann J. Havard and Husband v. Mary B. Atkins and Husband.

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The record of suit of *Atkins v. Fuller* was not improperly admitted. The parties were the same in the legal sense, and though the object of the suit was not the same, the documentary evidence showed that Atkins was advised of Fuller's prior rights to the land in question in this case as early as 1855, and must have concealed the fact when he obtained the patent. 4 Rob. 83. In connection also with oral testimony, it went to show possession by plaintiffs—an important fact in an action of jactitation.

On the whole we conclude that the verdict was not manifestly erroneous.

Judgment affirmed.

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No. 356.—C. B. CONNELL v. ALLEN MEDLOCK.

In attachment proceedings against a non-resident the sheriff must follow strictly the requirements of the Code of Practice in serving the attachment and citation by affixing copies of the same on the door of the building in which the court that issued the process is held, and the return of the sheriff must show that these formalities have been complied with, under penalty of nullity. C. P. 254.

**A** PPEAL from the Tenth Judicial District Court, parish of De Soto. *Levisse, J. Elam & Wemple*, for plaintiff and appellee. *Henry G. Hall*, for defendant and appellant.

WYLY, J. The defendant appeals from the judgment confirming the default and giving the plaintiff an attaching creditor's privilege on his property, the ground for the attachment being that plaintiff was a creditor for five hundred and ninety-one dollars and twenty-five cents, and the defendant was an absentee. The defendant asks for a reversal of the judgment, on the ground that the writ of attachment was not posted as required by law.

It seems that the citation was posted at the door of the courthouse, and the copy of the petition was served on the attorney *ad hoc*.

The sheriff's return does not mention that he affixed a copy of the attachment to the door of the room in which the court is held. If the defendant is an absentee, "in such case the sheriff shall serve the attachment and citation by affixing copies of the same on the door of the room where the court in which the suit is pending is held." C. P. 254.

These formalities stand in place of citation served on the defendant, and must be strictly complied with. 3 R. 232; 12 R. 462; 9 An. 550.

It is therefore ordered that the judgment herein be set aside, and that this cause be remanded in order to make service of citation according to law and for new trial. It is further ordered that appellee pay costs of appeal.

NO. 344.—CHARLES E. ALTER v. J. B. PICKETT—PAULINA PICKETT,  
Intervenor and Warrantor.

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105	485
24	513
120	182
24	513
122	470

A defendant in an hypothecary action founded upon a judgment rendered in a garnishment process, who files the plea of discussion and deposits the amount required to carry on the discussion, is not precluded thereby from the right of appeal from the final judgment ordering the property seized to be sold.

A judgment rendered by one of the district courts of the parish of Orleans against a person domiciliated in the parish of Bossier, under garnishment proceeding had under a judgment rendered by the district court of the parish of Orleans, is absolutely null and void, because the district court of the parish of Orleans is without jurisdiction *ratione personarum*. This nullity is so absolute that any person having any interest therein, or is affected thereby, may at any time urge such nullity before the tribunal where the attempt is made to enforce it.

The recording of such a judgment in the parish where the property of the defendant in garnishment is situated confers no mortgage rights in favor of the judgment creditor, and consequently does not lay the foundation for an hypothecary action against the property of the judgment debtor.

**A**PPEAL from the Eighteenth Judicial District Court, parish of Bossier. *Watkins, J. Land & Taylor*, for plaintiff and appellee. *Nutt & Leonard*, for intervenor and appellant.

LUDELING, C. J. This is an hypothecary action. On the twenty-sixth of January, 1866, the plaintiff obtained a judgment in the Third District Court of the parish of Orleans against R. C. Cummings & Co. for the sum of forty-six thousand one hundred and fifty dollars, with eight per cent. per annum interest thereon. On the ninth day of February, 1866, Alter caused a writ of *feri facias* to issue under this judgment, directed to the Sheriff of the parish of Orleans, and he filed a petition propounding interrogatories to Paulina Pickett under the act of 1839. On the twelfth of March, 1866, the petition and interrogatories were served on Paulina Pickett in person in the city of New Orleans. On the twentieth of March, 1866, she filed her answers to the interrogatories, denying any indebtedness to the defendants, R. C. Cummings & Co. On the twentieth of March, 1866, a supplemental petition, propounding additional interrogatories to Mrs. Pickett, was served on her in person at her domicile in Bossier parish, and on the twenty-sixth of April, 1866, she answered the interrogatories, again denying any indebtedness to the said Cummings & Co. On the fifteenth day of May, 1866, plaintiff Alter moved for a judgment *pro confesso* on the answers. Notice of this motion was served upon Hays & Adams. On the eleventh of June, 1866, the interrogatories were taken as confessed, and on the fifteenth day of June, 1866, judgment was rendered against Mrs. Pickett for thirty-two thousand nine hundred and sixteen dollars and seventy-one cents, with legal interest from the fifteenth of March, 1866. This judgment was duly recorded in the parish of Bossier. After the demand and notice required by article sixty-nine of the Code of Practice this suit was instituted

against James B. Pickett, the third possessor of the property, alleged to be subject to the plaintiff's judicial mortgage.

The defendant filed in *limine litis* the plea of discussion, and tendered the sum necessary to defray the expenses thereof. The court *a quo* held that the plea was an answer, and so treated it. Whereupon the defendant took a bill of exceptions to this ruling. He then filed an answer denying the validity of the judgment against Mrs. Pickett, and denying that any mortgage resulted from the registry thereof, and he called Mrs. Pickett, his vendor, in warranty. She answered the call in warranty and made substantially the same defense as that set up by the defendant, to wit, she denied the validity of the judgment against her, because the Third District Court of the parish of Orleans was without jurisdiction to render a judgment against her, as she resided at the time in the parish of Bossier.

*Second*—Because the writ of *feri facias* against the judgment debtor had expired, and there was no *feri facias* nor any copy thereof in the hands of the sheriff at the time interrogatories were propounded and served upon her.

*Third*—Because the court had no power to enter judgment against the garnishee, who had denied all indebtedness, without a traverse of her answers; that is, a joining of issue and notice to the garnishee to afford her a fair opportunity to be heard and to support her sworn answers by proof *aliunde*.

There was judgment in favor of the plaintiff condemning the lands in the possession of the defendant to be seized and sold in satisfaction of plaintiff's mortgage in default of its payment by defendant, subject to the discussion of the property mentioned in the plea of discussion, which was sustained in the final judgment. Both the defendant and the intervenor have appealed. The plaintiff has moved to dismiss this appeal as to the *defendant*, on the following grounds:

*First*—Because the plea of discussion can not be pleaded in an answer which denies the existence and validity of the plaintiff's mortgage.

*Second*—Because the plea of discussion, like a plea of payment, novation or compensation, is inconsistent with and waives the general denial.

*Third*—Because the plea of discussion admits the existence and validity of plaintiff's mortgage.

*Fourth*—Because defendant has executed the decree of the court sustaining his plea of discussion by depositing the sum of five hundred dollars in the bank of B. M. Johnson, in Shreveport, to have the discussion carried into effect; and

*Fifth*—Because defendant has no interest in the judgment appealed from.

The plea of discussion was filed in *limine litis* by way of exception, and



is neither admitted nor denied the existence of the mortgage. The first three grounds in the motion to dismiss the appeal are not causes for dismissing an appeal; nor is the depositing of the five hundred dollars required by the court such an execution of the judgment as would deprive defendant from appealing from the judgment which condemns the sale of his property conditionally. He had a right to require the judge *a quo* to act upon his *exception*, and to stay the proceedings against his property until after the property pointed out by defendant had been discussed. C. P. 715; C. C. 3403; 9 R. 71; 10 R. 73; 12 An. 363; 23 An. 773.

The motion is overruled.

On the merits we deem it necessary to notice only the first of the grounds of defense, which is that the judgment against the garnishee, Mrs. Paulina Pickett, is an absolute nullity, because it was obtained against her in the parish of Orleans while her domicile was in the parish of Bossier. But before examining that question we will notice the objections urged by the plaintiff to that defense being permitted to be made in the present suit, and especially by the defendant. They are, that the district court of Bossier parish was without jurisdiction to annul a judgment of the Third District Court of the parish of Orleans; that said judgment is final and can not be attacked or inquired into in this suit, and particularly by defendant; that an action to annul the judgment is prescribed; that the garnishee submitted to the jurisdiction of the Third District Court of the parish of Orleans, and has acquiesced in the judgment by not appealing. A sufficient answer to all these objections is that the defense set up is that there *never existed a judgment* against her—that the court which rendered it was without jurisdiction, and therefore could not render any judgment in the case. It is a well settled rule of jurisprudence, founded upon justice and common sense, that the absolute nullity of a judgment may be invoked before the tribunal where the attempt is made to enforce it, and by any person whose interests may be affected by the judgment. 1 N. S., p. 8, *Bernard v. Vignaud*; 2 R., p. 510, *Quine v. Mayes*; 11 An. 761, *Williams v. Clark*; 23 An. 557, *Simpson v. Hope*.

It is proved that Mrs. Paulina Pickett resided in Bossier at the time the proceedings against her were commenced in the Third District Court of the parish of Orleans; that she had resided there for years before, and that she resided there when the judgment was rendered against her.

The act of nineteenth of March, 1861, amending article 162 of the Code of Practice, prohibits a defendant from being sued out of the parish of his domicile, except in cases "expressly provided by law."

This is substantially announced in the following cases: *State ex*

rel. v. Watkins, 21 An. 258; State ex rel. v. Head, 21 An. 550; Richardson v. Hunter, 23 An. 255.

It is contended that the act of 1861 amending the Code only reprobated the election of a domicile, or the express consent to be sued in another parish than that of his domicile, but that the act did not prohibit the defendant from submitting to the jurisdiction, and article 93 of the Code of Practice and the case of Jex v. Keary are referred to in support of the position. If article 93 of the Code be in conflict with the act of 1861, the latter being the last expression of the legislative will relative to the jurisdiction of the courts, *ratione personarum* must prevail. In Jex v. Keary, 18 An. 89, the court seems to have entertained a different opinion. The point actually decided in that case, however, was that a defendant who by his contract and mortgage executed in 1856, had consented that suit might be brought against him in the parish of Orleans was bound by that consent, and that the legislature had no power by the subsequent act of 1861 to impair the right of the creditor to pursue the defendant at the elected domicile, because that would impair the obligation of a contract. We do not feel called upon to notice that case further, except to state that the facts of that case are wholly different from those in this case. See 21 An. 258; 21 An. 550; 23 An. 255.

Since the act of nineteenth of March, 1861, amending article 162 of the Code of Practice, every one residing in this State "must be sued before his own judge—that is to say, before the judge having jurisdiction over the place where he has his domicile or residence, and shall not be permitted to elect any other domicile or residence for the purpose of being sued, but this rule is subject to those exceptions expressly provided for by law." But it is contended that this case comes within one of the exceptions created by law; that article 246 of the Code of Practice expressly declares that a creditor may make a garnisher a party to the suit against the debtor; and the attempt is made to deduce the conclusion that the debtor of the original judgment debtor, although residing in a different parish, may be cited as garnishee, and thus subjected to the jurisdiction of the court which rendered the original judgment. But this is a *non sequitur*. The debtor may be cited in garnishment, but where? Article 642 C. P. requires the writ of *fiery facias* "to be directed to the parish in which the property of the debtor is situated, and it orders him to seize the property, real and personal, rights and credits of the debtor, and to sell them to satisfy the judgment obtained against him." "Rights and credits" can be seized under *fiery facias* generally only by the auxiliary process of garnishment, and as article 642 requires this seizure to be made by the sheriff of the parish in which the effects to be seized are, it would seem that the garnishment process should be

## Alter v. Pickett.

issued by a court of the same parish. And such, in effect, was the opinion of this court in *Featherston v. Compton*, 3 An. 380; 4 An. 585; *Favrot v. Piane*, 7 An. 239; *Landry v. Dickson*, 3 La. 127; and *Rochereau v. Guidry*, 24 An. 311

The present case does not come within any of the exceptions expressly provided for by law. We conclude, therefore, that the judgment rendered by the Third District Court of the parish of Orleans against Paulina Pickett in 1866 was an absolute nullity for want of jurisdiction *ratione personæ*, and that the registry of the judgment in Bossier did not create a judicial mortgage against the property of Paulina Pickett.

It is therefore ordered and adjudged that the judgment of the lower court be annulled; that the judgment of the Third District Court of the parish of Orleans in favor of Charles E. Alter against Paulina Pickett for the sum of thirty-two thousand nine hundred and fifteen dollars and seventy-one cents, with five per cent. per annum from the first day of March, 1866, rendered on the fifteenth of June, 1866, be declared null and void, and that the plaintiff's demand be rejected, with costs in both courts.

Rehearing refused.

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No. 369.—C. E. R. KING v. SUCCESSION OF J. B. TRIGG. G. W. BROACH  
v. THE SAME. (Consolidated.)

A proceeding by rule against an administratrix requiring her to show cause why she should not be dismissed from office for gross neglect of duty, and why judgment should not be rendered against her and her sureties *in solido* for the amount claimed in the rule is irregular, and a judgment rendered thereon dismissing her from office will be annulled on appeal.

**A**PPPEAL from the Eighteenth Judicial District Court, parish of Bossier. *L. W. Baker*, Parish Judge. *Richard W. Turner*, for succession, appellant. *Robert J. Looney*, for appellees.

**TALIAFERRO, J.** In each of these cases a summary proceeding by rule was instituted against the administration of the estate of J. B. Trigg, requiring her to show cause why she should not be dismissed from office for gross neglect of her duties as administratrix, and why judgment should not be rendered against her and her surety *in solido* for the amount claimed by the respective plaintiffs as owing them by the succession. Each of the plaintiffs prayed also that the administratrix be ordered to file an account of her administration. It seems that in conformity with an order of the parish court rendered on these petitions, the administratrix filed a statement of debts against the estate, by which it would appear that it is largely insolvent. The claims of the plaintiffs, which had been some time before accepted by the administratrix as debts against the succession, were placed on this statement of

debts. An order was rendered homologating the statement of debts, and decreeing that they be paid if the succession be solvent; if not, that they be paid in conformity with a tableau of distribution to be subsequently filed. No opposition was presented to the statement of debts, and no further proceedings taken in reference to it, or to the filing of a regular tableau and classification of debts. A judgment was rendered in each case dismissing the administratrix from office, decreeing judgment *in solido* against the succession and the administratrix in her personal capacity for the amounts claimed, and that she render a final account within ten days after notice of the judgment.

From these judgments the administratrix has appealed.

The proceedings are clearly irregular. No sufficient grounds are shown for the stringent order removing the administratrix from office, and none for the rendition of the judgments in favor of the plaintiffs. From the evidence in the record the presumption is strong that the estate will not be able to pay its debts in full, and that the plaintiffs, who are ordinary creditors, will have to share with other creditors of the same class in a *pro rata* distribution of the assets of the succession.

It is therefore ordered that the judgment of the parish court be annulled, avoided and reversed. It is further ordered that the rule taken by plaintiffs be dismissed, reserving their right to prosecute their claims against the succession in due course of law, the plaintiffs and appellees paying costs in both courts.

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119 341

**No. 321.—CONSOLIDATED ASSOCIATION OF THE PLANTERS OF LOUISIANA  
v. J. W. MASON et als.**

An appeal that has been taken before the judgment is signed is nugatory, and another appeal taken after the judgment is signed is in no manner affected by the one taken before the signing.

The time allowed by law for taking a devolutive appeal only commences to run from the date of the signing of the judgment, and in case the appeal is taken by motion in open court at the same term the judgment is signed, citation of appeal is unnecessary. 23 An. 618.

The acts of the General Assembly of Louisiana providing for the liquidation and settlement of the Consolidated Association of the Planters of Louisiana, under the management of a board of directors, who are authorized to do every thing necessary to effect the liquidation, must be held as authorizing them to stand in judgment.

A mortgage given on a tract or body of land is sufficiently descriptive if it is reasonably accurate and full in itself so as to inform the public what property is covered by it without stating the township, range and section in which it lies.

**A** PPEAL from the Fourteenth Judicial District Court, parish of Ourchita. Ray, J. Morrison & Farmer, for plaintiff and appellant. Stubbs & Cobb and Richardson & McEnery, for defendants and appellees.

HOWELL, J. The appellees move to dismiss on the grounds:

*First*—Appellants have taken and abandoned an appeal in this case, which was returnable to this court on the third Monday of July, 1870, and they can not renew their said appeal.

*Second*—More than a year elapsed between the dates of the rendition of the judgment and the order of this appeal.

*Third*—This appeal was taken in open court at a time subsequent to that at which the judgment was rendered, and no citation of appeal issued.

These grounds are insufficient. When the first appeal was asked for and granted the judgment was not signed and the appeal was nugatory. The judgment was signed in April, 1872, when it became final and appealable, and at the same time an appeal was taken in open court on motion, and no citation was necessary. 23 An. 618; 20 An. 499; 11 An. 181; 4 An. 106; C. P. 546, 565. Motion refused.

This is an hypothecary action to enforce the payment of certain contributions on the stock subscriptions of J. W. Mason and wife as subscribers to the stock of the Consolidated Association of the Planters of Louisiana, and holders of eight shares thereof on the property mortgaged to secure the subscription money therefor, and as authorized under acts of the Legislature incorporating said association, and the various acts relative to the proposed banks, and especially the act approved February 26, 1866, entitled "an act providing for the final liquidation of the Consolidated Association of the Planters of Louisiana."

The widow and administratrix of J. W. Mason and E. Tisdale, one of the third possessors, except to the petition, "that the charter of the bank has been declared forfeited, and that the president and directors of said bank, whose petition defendants are called on to answer, are without authority to sue, and consequently can not stand in judgment."

We think a fair interpretation of the statutes above referred to recognizes the existence of the corporation for the purpose of its liquidation, in the interest of the State, under the management of directors, who are authorized to do every thing necessary to effect the liquidation, including the authority to stand in judgment.

Hart, another third possessor, filed an exception that the land mortgaged is not sufficiently described in the act, and the mortgage is void for uncertainty, and that the record of the mortgage being in the French language is not binding on third possessors.

The description is in the following words: "Une terre de cinq arpents de face, limitrophe à la ville de Monroe, sur quarante arpents de profondeur, dont cinquante arpents seulement sont cultivés en coton et maïs, le surplus étant en trois actions." The act was executed in April, 1830. The article of Code (3306), relied on by exceptor, says: "To render a conventional mortgage valid, it is necessary that the act establishing it shall state precisely the nature and situation of each of the immovables on which the mortgage is granted."

The question arises, does the above description conform to the rule

there prescribed? Does it state first the nature of the immovable? The answer must be in the affirmative: a tract of land. Does it state, secondly, the situation of the immovable? It says, a tract of land of five arpents front, bounding or adjoining the town of Monroe, with forty arpents in depth, of which fifty arpents only are cultivated in cotton and corn, the balance in standing timber. We presume that in April, 1830, when Monroe was a village, no one would have been at a loss to identify the property from this description of its situation. It was a tract of land of five arpents in width or front and forty arpents in depth, making two hundred arpents; its front adjoined or bounded the village of Monroe in such a position necessarily as to run back forty arpents in depth; the village of Monroe at that date was not so large a one as to create the presumption that there were many tracts of land of those dimensions and position, belonging to Mr. and Mrs. J. W. Mason, adjoining or bounding it. But the description is still more precise: at that date only fifty arpents of the tract of two hundred were in cultivation in cotton and corn. It was therefore a small plantation belonging to Mr. and Mrs. J. W. Mason, and adjoining the village of Monroe, of which fifty arpents were then cultivated in cotton and corn and the balance was in standing timber. The situation of the property was adjoining or bounding the town of Monroe, and of such a shape, quantity and position, as to inform any reasonable man of ordinary experience examining the public records for incumbrances on Mr. and Mrs. Mason's property, where the land was which they mortgaged to the Consolidated Association of the Planters of Louisiana on the seventeenth April, 1830. As said in *Hyde v. Bennett*, 2 An. 799, the description must be reasonably accurate and full in itself so as to inform the public what property is covered. And in *Ells v. Sims*, same volume 251, it was said: A distinction may be fairly made between urban and rural estates, and greater minuteness and accuracy of detail might properly be required in the former than in the latter case. The question is whether, under the circumstances, any one contracting with the mortgagor, or in any wise trusting him, or interested as a creditor, would have been misled or kept in the dark by the omission to state the township, range and section in which the land is situated. See also 2 An. 371, 471; 12 An. 148; 21 An. 396.

We are not prepared to fix the line between a valid and invalid or sufficient and insufficient description, which shall serve as a guide in all future cases. Each case must depend on its own circumstances. In this case we can not say that the act is so deficient in the description of the property in regard to its nature and situation as to render the mortgage invalid.

The remaining question, as to the act being in the French language, was elaborately examined by the Supreme Court in the case of *Tighl-*

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Consolidated Association of the Planters of Louisiana v. Mason et al.

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man v. Dias, 12 O. S. 692, and was decided adversely to the view of the exceptors. This ruling has been since adhered to. See 3 N. S. 551; 3 An. 123. Whether article 109 of the present constitution has worked a change on this subject, it is unnecessary now to decide.

We have come to the conclusion that the exceptions in this case were erroneously sustained.

It is therefore ordered that the judgment appealed from be reversed, that the exceptions filed by the defendants be overruled and that this cause be remanded to be proceeded with according to law—defendants to pay costs of appeal.

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No. 345.—ALEXANDER POPE v. JOHN B. FOSTER—JEANNETTE FOSTER, Intervenor.

The wife who joins her husband in the purchase of a tract of land and takes the title to a portion of the land in her own name, for which a cash payment is made and acknowledged by the vendor, and for the balance notes are given with the vendor's privileges retained, can not be permitted to intervene in a suit by the vendor to enforce the vendor's lien and be relieved from the vendor's lien so far as her portion of the property is affected, unless she shows that the money paid for her portion of the land was her separate paraphernal funds, and under her separate administration at the time.

**A** PPEAL from the Tenth Judicial District Court, parish of De Soto. *Leveiss, J. Nutt & Leonard*, for plaintiff and appellant. *Elam & Wemple*, for intervenor.

WYLY, J. On sixteenth December, 1869, the plaintiff sold eight hundred and eighty-five acres of land to John B. Foster and his wife Jeannette Foster, by act under private signature, acknowledging as the price the receipt of \$2500 cash from the said Jeannette, and two notes from said John B. Foster, one for \$2500, due first January, 1871, and the other for \$1000, due first January, 1872. Following the description of the land in the deed is this clause: "And I hereby convey three hundred and sixty acres of said land to said Jeannette Foster for the consideration aforesaid, and the remaining portion thereof to the said John B. Foster for the promissory notes made, executed and delivered to me this day by said John B. Foster, to have and to hold to the said Jeannette and John B. Foster (reserving to myself the vendor's lien), their heirs and assigns." This suit is brought on the first note and to enforce the vendor's privilege on the whole tract.

Jeannette Foster (the wife of the defendant) intervenes and prays to be recognized as the owner of three hundred and sixty acres of the land free of the vendor's lien. She also prays for partition of the land.

The court recognized the title of the intervenor and ordered a partition; it also gave judgment against the defendant John B. Foster for the amount of the note, and recognized the vendor's lien on all the

Pope v. Foster.

land except the three hundred and sixty acres, decreed to belong to Jeannette Foster.

We think the court erred in allowing the demand of the intervenor.

The property acquired in her name is presumed to belong to the community, and liable to community debts. To show title the intervenor must prove affirmatively that the sum paid for the land was her paraphernal funds, under her separate administration. See *Shaw v. Hill*, 20 An. 531.

This has not been done. The only proof introduced by her is the testimony of her husband, which fails to convince us that she owned the funds paid for the land, and that she had them under her separate administration. The plaintiff's vendor's privilege should be recognized on the whole tract.

It is therefore ordered that the judgment in favor of the intervenor be annulled and that her demand be rejected with costs; it is further ordered that the judgment in favor of the plaintiff be amended by allowing the vendor's privilege to be enforced on all the land described in the deed which the plaintiff executed on the sixteenth December, 1869, to the defendant and his wife, and as thus amended let it be affirmed, with costs.

No. 339.—MARY B. POWELL v. B. F. O'NEIL, Sheriff. EXECUTORS OF DENMAN v. MARY B. POWELL and H. S. BOSLEY.

The action by a creditor to annul a judgment of the wife against her husband, on the ground that it was obtained through fraud and collusion, is prescribed by one year. C. C. 1394. The same prescription applies to the attack in the sale to the wife made under the judgment for fraud or collusion.

**A**PPPEAL from the Tenth Judicial District Court, parish of Bossier. *Levisse*, J. J. D. *Watkins*, for executors, appellees. *Nutt & Leonard* and *Looney & Ashton*, for appellants.

HOWE, J. These cases are consolidated. The first is a suit to enjoin the sale of certain lands of which Mrs. Mary B. Powell, the plaintiff, claims to be owner by virtue of her alleged purchase at sheriff's sale on the fifth of October, 1867, under *feri facias* issued on a judgment in her favor against her husband, dated March 29, 1867.

The amount of the judgment was eleven thousand seven hundred and ten dollars; the price paid by her at sheriff's sale, one thousand seven hundred and fifty-eight dollars and fifty-seven cents, being the full appraised value.

The second suit is one instituted about the time of the seizure by the seizing judgment creditors to have the judgment of Mrs. Powell against her husband and all sales thereunder [to her] declared in the language of the prayer of the petition, "simulated and fraudulent and informal and null and void."



*Mary B. Powell v. O'Neil, Sheriff. Executors of Denman v. Mary B. Powell and Bosley.*

The first question is in regard to the prescription of one year pleaded to the action of Denman's executors to annul the wife's judgment. The judgment of Denman was recovered September 16, 1870, and the action by his representatives to annul was not filed till October 10, 1871. On the petition there appears a waiver of citation and acceptance of service dated April 4, 1871, and signed by the gentlemen who are now the attorneys of record for Mrs. Powell and her husband.

We do not think that this waiver could have any effect except from the time the petition was filed in court. The action to annul, considered as the revocatory action proper, is therefore prescribed under act 1994 of the Revised Code, as interpreted in *Frere v. Mentz*, 23 An. 546; and see *Van Wickle v. Garrett*, 14 An. 106.

But the counsel for the executors of Denman insist that their action is one in declaration of simulation and not prescriptible by one year. We do not so regard the case as disclosed by the record. The judgment is clearly a real one, and the case is quite like that of *Landry v. Marchaer*, 6 An. 87, where the plea of prescription of one year was maintained.

The same prescription applies to the attack in the sale to the wife under the judgment for fraud or collusion, it appearing to be a real contract. *Dennistoun v. Nutt*, 2 An. 483.

The alleged informalities on the sale, if such they are, do not concern the executors of Denman so long as they are precluded from attacking the judgment of the wife. No injury or loss of advantage in a legal sense is shown to have resulted to them from these informalities alone. 11 Rob. 533; 6 An. 581; 9 An. 602; 10 An. 497; 5 An. 570.

The absence of stamps on the sheriff's deed was supplied by permission of the collector of internal revenue, and it is not necessary to inquire what would have been the effect on the rights of Denman if they had never been affixed. We had occasion to pass on this question in the case of succession of *Durand*, lately decided. 24 An. 352.

It is urged that the judgment of Mrs. Powell is void for want of reasons as required by the Constitution.

This point has generally been raised by appeal, but if it be properly made in this proceeding it is enough to remark that the absence of any exception or answer by the defendant in that suit was a sufficient reason. 3 Rob. 156. In such a case the phrase "by reason of the law" and the evidence necessarily refer to the law and evidence adduced by plaintiff.

It is therefore ordered that the judgment appealed from be reversed; that the suit of the executors of Denman be dismissed, and that the injunction issued herein in favor of Mrs. Mary B. Powell be made perpetual, and that she recover costs in both courts.

No. 350.—A. F. COLEMAN, Executor, v. PERCY BAKER—A. B. GEORGE,  
Intervenor.

A dative testamentary executor has the right to bring suits to preserve the property of the estate he represents, in any parish of the State, without reference to his own domicile.

A suit by the owner to redeem lands that have been sold for taxes is not a petitory action to recover the lands on the ground of a superior title.

A purchaser of lands at a tax sale must be reimbursed the purchase money with interest before the owner can recover.

**A**PPEAL from the Eighteenth Judicial District Court, parish of Bossier. *T. M. Fort*, Judge *ad hoc*, vice *Watkins, J.*, recused. *Egan, Williamson & Wise*, for intervenor and appellee. *J. D. Watkins* and *Richard W. Turner*, for defendant and appellant.

Howe, J. This is an action by the dative executor of Peter G. Thompson, deceased, to redeem certain lands which had belonged to Thompson, but had been purchased at tax sale by the defendant Baker, on the twenty-seventh November, 1869.

It is not, as urged by defendant's attorney, a petitory action. The plaintiff admits the regularity of the purchase at tax sale by defendant, but claims that he has defeated the inchoate rights of defendant by having tendered to him within the year allowed by statute, the price, with the penalty, costs, etc. The defendant admits the title in Thompson at the moment of sale. The only question at issue between the plaintiff and defendant is whether the statute has been complied with in such a way as to entitle the plaintiff to a redemption. The conflict of title involved in the petitory action is not found in this.

This suit was commenced on the twenty-second November, 1870, within a year from the sale. It is plain that the necessary offers were made both by plaintiff and intervenor to refund to Baker the amount paid by him, with the interest, penalties, etc., required by law, and that he refused to accept and to restore the property. A letter from him to the intervenor expressing at great length the reasons of this refusal, is found in the record. He can not, as a matter of course, complain of not being put in default. It has, moreover, been settled that the formal tender, article 407 C. P., is not required in this action. *Brooks v. Hardwick*, 5 An. 675.

The defendant filed many exceptions which, as urged here, may be fairly reduced to three: *First*, that the plaintiff being public administrator of the parish of Bienville, can not administer property in the parish of Bossier, and therefore (as we infer) can not bring this suit; *second*, that his appointment by the parish court of Bienville was irregular; and, *third*, that the will of Peter G. Thompson, filed and made executory in Bienville parish, was void as containing substitutions and *fidei-commissa*.

The court *a qua* properly overruled these exceptions. The plaintiff

was appointed dative executor of the succession of Peter G. Thompson, deceased, in the parish of Bienville, where the deceased, a resident of Mississippi, left a considerable property. The defendant has not claimed the appointment and does not claim it now. As dative executor the plaintiff has a right to bring suits to preserve property in any parish. The other question presented by the exceptions is one in which the defendant has no interest. How can it matter to him that there is one clause in the will of Peter G. Thompson, which we shall hereafter refer to, containing a substitution or a *fidei-commissum*? It may interest him as a student, but it certainly does not concern him as a litigant.

The exceptions having been overruled, the defendant filed a general denial, modified by the admission that he bought the land at tax sale, as alleged by plaintiff.

A. B. George intervened, alleging ownership of the land by purchase in March, 1870, in Mississippi, under the will of Thompson.

There was judgment in favor of intervenor, decreeing him to be the owner of the land and putting him in possession; and the plaintiff and defendant appealed. We have already stated enough to show that the defendant has no reason to complain of the judgment, except in one respect. It does not require the intervenor to repay to him the amount of his bid, with interest, etc., as required by law. This it should have done. The sale is, *prima facie*, valid. Const., art. 118. The pleadings do not allege any such irregularities in the sale as to deprive the defendant of this right. The intervenor having been careful to offer this amount before suit, and the plaintiff having conceded the regularity of the sale, and both parties urging that this is an action to *redeem*, we see no good reason why this repayment should not be made. Indeed, a redemption without this payment would seem to be a contradiction in terms.

The only remaining point is raised by the plaintiff as against the intervenor; and that is, that by item fifth of the will of Peter G. Thompson, the property in question, with other lands, was left to two trustees, to be by them sold and the proceeds divided between the wife of the testator and his brother; that this provision is a prohibited *fidei-commissum* or substitution, and that by his purchase the intervenor obtained no title. The question is not raised by the pleadings, and we can not say whether it was discussed at all in the court below. Conceding, however, that we may consider it as presented by the documents in the record, we do not perceive that the title of the intervenor is subject to the infirmity suggested. The testator lived and died in Mississippi; the trust was valid there; it was immediately executed there, and the wife and brother of the deceased joined in the act of sale to George. We ought not to declare all this a nullity

unless it be clearly contrary to our public policy, and we can not say that it is.

The clause in the will is certainly not a substitution. *Beaulieu v. Ternoir*, 5 An. 480. Nor is it clearly a prohibited *fidei-commissum*. The Code, in abolishing *fidei-commissa*, seeks to prevent property from being tied up for a length of time and placed *hors de commerce*; it does not abolish naked trusts uncoupled with an interest to be executed immediately. 5 N. S. 302; 5 An. 472.

For the reasons given it is ordered that the judgment appealed from be amended, by requiring that before the intervenor be put in possession he pay to the defendant the sum of one hundred and eighteen dollars and fifty cents, and that as thus amended the judgment be affirmed; that the defendant pay costs of the lower court, and intervenor those of the appeal.

24	526
48	725
24	526
52	1173
24	524
113	97

**No. 170.—HEIRS OF BROWN et als v. E. & B. JACOBS et al—J. W. McDONALD, Administrator, Intervenor.**

An agreement made and reduced to writing between the administrators of an estate and third parties relative to the sale of a plantation under administration by them which fixes a price per acre, and binds the administrators to make a good title before the money is paid is not, in itself, a fraudulent nor an illegal act which will vitiate the sale when regularly made in pursuance of the forms of law in the sale of succession property.

If the terms of the sale of succession property were partly for cash and partly on credit, the fact that the purchaser chooses to pay the entire price in cash is not an evidence of fraud on the part of the purchaser, especially if the notes which were to be given for the credit portion only drew interest after a specified time from their execution.

Forced heirs have only a residuary interest in the succession of their ancestors, and they can not therefore maintain an action to annul a judicial sale which has been regularly made of their ancestors' property to pay the debts of the succession.

A judicial sale of real estate belonging to a succession which has been made for the purpose of paying the debts of the estate before the adoption of the Constitution of 1868 is not void or voidable, because the price received was in Confederate treasury notes. Article 149 of this Constitution has no application to contracts which had been executed before its adoption. In such a case the courts will leave the parties where their conduct has placed them.

**A** PPEAL from the Tenth Judicial District Court, parish of Caddo. *C. M. Pegues*, attorney at law, Judge *ad hoc*, vice *Levisse*, Judge, recused. *W. B. Egan*, for plaintiff. *Nutt & Leonard*, for intervenor. *John Ray*, for E. & B. Jacobs, defendants. *George Williamson* and *S. L. Taylor*, for defendants.

**LUDELING, C. J.** This suit was instituted by the forced heirs of J. H. and Rebecca S. Brown, deceased, and J. T. Bryan, a judgment creditor of said decedents, to annul a judicial sale of the plantation and personal property belonging to said successions, made on the fourteenth day of April, 1863, to E. and B. Jacobs, and to recover the plantation and the value of the personal property thus sold.

The nullity of the sale is claimed on the following grounds: That the sale was without any legal, valid or valuable consideration—the price paid being Confederate money; that the sale was for much less than the appraised and real value of the land; that the price being in Confederate money it was less than one-thirtieth of the value of the land; that there was no commission to the administrators or any person to authorize them to make a sale; that Morrow and Kennon never qualified as administrators of the succession of R. S. Kennon, which was never regularly opened; that two of the children of J. H. and R. S. Brown died before the sale, and their successions were never opened; that no family meeting was held to fix the terms and conditions of the sale in the interest of the heirs, who were minors; that there was no meeting of creditors, and neither they nor the heirs ever consented to the sale; that the forms of law and the terms of sale were not complied with; that the real estate could not be sold legally until the slaves and personal effects of the succession had been sold; that the slaves and personal property would have sufficed to pay the debts, but they have been lost to plaintiffs through the acts and neglect of the defendants and the administrators; that there was not property enough left to pay the debts, but that with the land there will be enough to pay the debts and leave something for the heirs; that no part of the consideration for the sale inured to the benefit of the heirs or creditors; that although the sale was clothed with some of the forms of law, yet it was made through fraud and collusion between E. and B. Jacobs and the administrators, and that its real purpose was to carry out an illegal and fraudulent agreement entered into by private writing on the fifth day of December, 1862; that the succession of Rebecca S. Brown was not opened when the private agreement was entered into, and that Kennon and Morrow subsequently applied for the administration in order to carry out said agreement, and for that purpose all the subsequent proceedings were had; that no tableau of debts was filed in the succession of Rebecca S. Brown, and no necessity was shown to sell said lands, and that none existed; that said Morrow and Kennon applied for an order in said succession to sell the land before procuring their appointment as administrators, and that the orders of appointment and for the sale bear the same date, and were made with a view to forward the execution of said private agreement, all of which was well known to the defendants prior to the sale.

The defendants are A. Marshall, a tenant in possession; E. J. Kennon, one of the former administrators of the successions of Brown and Edward and Benjamin Jacobs, the purchasers of the property and the real defendants.

Marshall and Kennon filed general denials. E. and B. Jacobs admit their possession of the land in dispute, and aver that they bought it in.

good faith at a judicial sale on the fourteenth day of April, 1863, and that they have paid the price in full. They deny the charge of fraud and collusion, and they pray for the value of improvements in case of eviction.

The case has been argued orally and by briefs with great zeal and ability, and after a careful examination of the record and the authorities cited we have reached the following conclusions:

James H. Brown died in Bossier parish in the year 1860, and his wife Rebecca S. Brown died within a few months thereafter, leaving several children, of whom the plaintiffs alone survive. When J. H. Brown died he was in possession of a plantation on Red River, a number of slaves, mules, cattle and hogs, a quantity of corn and cotton and other personal property which belonged to the community of acquets and gains, which had existed between himself and his wife. On the tenth day of April, 1861, Morrow and Kennon were appointed administrators of the estate of J. H. Brown. On the eighth of December, 1861, an order was granted on their application for the sale of the land, but the sale was not made.

In December, 1862, the administrators of E. and B. Jacobs entered into the following agreement:

"This obligation entered in duplicate between James M. Morrow and Edward J. Kennon of the one part and E. and B. Jacobs of the other part. The first party, residents of Claiborne and Bienville parishes, and the second party, residents of Caddo parish, witnesseth that the said Morrow and Kennon, administrators of the succession of James H. Brown, deceased, do hereby bind themselves individually and personally unto the said E. and B. Jacobs to perfect and make good title to them of the plantation belonging to the succession of the said James H. Brown, lying on the west bank of Red River, in Caddo parish, Louisiana, bounded on the north by Daniel's plantation and on the south by Patrick Cash's, and opposite the Waterloo plantation, supposed to contain about five hundred and fifty acres, more or less—the number of acres to be ascertained by a survey to be made by Hailey Watts, or any other legally authorized surveyor, within forty days from this date, the same to be made at the expense of the said succession. The said Morrow and Kennon bind themselves to perfect said title as aforesaid by due legal sale at public auction within the next forty days. The consideration for the above transfer is as follows: The said E. and B. Jacobs bind themselves to pay to the said administrators seventy-five dollars per acre for each and every acre there may be ascertained to be contained in said tract by said legal survey—that is to say, seventeen thousand dollars to be paid down in cash upon the completion and perfection of the title, and upon the giving of possession of said land, and the balance of said purchase money, whatever it may be upon

the ascertainment of the number of acres, at the said rate of seventy-five dollars per acre, payable in two equal installments, the first due six months after the sale and perfection of title, and the second due in twelve months after said date, with mortgage to secure payment.

"And it is understood between said parties that the said E. and B. Jacobs shall have the privilege of making any larger cash payment than is hereinbefore stipulated, and that the said E. and B. Jacobs shall, at any time before the falling due of the installments or credits, be allowed to take up their outstanding notes therefor.

"And the said E. and B. Jacobs do further bind themselves to pay interest at the rate of eight per cent. per annum upon the credit installments four months after the day of their date.

"Thus done and signed at Minden, Claiborne parish, State of Louisiana, in presence of the undersigned witnesses, this fifth day of December, 1862.

"J. M. MORROW,

"E. J. KENNON,

"E. and B. JACOBS."

"Witnesses :

"J. P. SMITH,

"H. A. DREW."

On the eighth of December, 1862, Morrow and Kennon presented their petition to the court for the sale of the plantation, and an order to sell was granted on the same day. No sale appears to have been made under that order. About one month after Morrow and Kennon applied to be appointed administrators of the estate of Mrs. Brown. They took the oath required by law on the second and third of March, the bond was filed on the sixth of March, 1863, and on that day the order of appointment was signed. Morrow and Kennon, as administrators of both successions, then applied for an order to sell the property, which was granted, and after due advertisement the property was adjudicated by one of the administrators to E. and B. Jacobs for seventy-five dollars per acre, and according to the terms of the advertisement and order. Whether there was a commission or execution issued under this order is not made certain by the record before us—none is found in the record; but the *procès verbal* of the sale made by the administrator recites that the administrator of both successions, "in pursuance of the annexed commissions issued in said successions," adjudicated the property to E. and B. Jacobs. A commission, however, had been issued under the first order to sell the property of the succession of James H. Brown. Both orders directed the administrators to sell the property and fixed the same terms. We do not think a commission or execution in such a case indispensable. 18 An. 435; R. Statutes, p. 32, sec. 18.

The administration of J. H. Brown's estate involved the administra-

tion of the community property, which alone composed the succession of Mrs. Brown. No administration of Rebecca S. Brown's estate was necessary to vest a good title in the property sold. 17 La. 238 and 12 An. 223, succession of McKean.

The interest which the forced heirs had in the property of the succession of their parents was residuary. After the debts are paid the residuum will belong to them. 10 R. 457. And they were not entitled to any other notice of the sale than that given by the advertisements made in accordance with law. Neither was the consent of the creditors needed to make the sale, as the succession was not administered as an insolvent estate, nor was it necessary that a tableau of debts should have been filed prior to obtaining an order for the sale. C. C. 1051, 1058, 1063; 11 An. 633; 2 An. 503; 12 R. 545.

The charge of fraud seems to be predicated chiefly on the private agreement between the administrators and E. and B. Jacobs, and the fact that the price was paid in Confederate money, and that the notes executed for the credit installments were paid on the day the title was passed. The evidence shows that there was a necessity to sell property to pay debts. The tableau of debts, filed shortly after the sale, shows that debts due by the estate and contracted for the education and support of the heirs amounted to upwards of sixty thousand dollars. It appears, further, that the administrators consulted with the relatives of the minors as to whether the land or slaves should be sold, and that it was deemed most to the interest of the children that the land should be sold; that the administrators having learned that the Messrs. Jacobs desired to buy a Red River plantation, wrote to them that the Brown plantation was for sale. In the interview which followed, the administrators informed the Messrs. Jacobs that it would be useless to visit the plantation unless they were willing to give seventy-five dollars per acre for it. After examining the plantation the Messrs. Jacobs agreed to give seventy-five dollars per acre for the property, provided a good title to the same should be given them. We are unable to discover anything in the agreement to indicate a fraudulent or improper intent. The administrators were desirous of securing a bidder for the property at the price stipulated (which is proved to have been the full value of the property at the time the sale was made), and they were not willing to incur the expenses necessary to make a sale unless they had some assurance that the appraisement would be bid by some one. We see nothing improper in this. Every one is presumed to know the law, therefore we can not presume that, even if this private agreement had been known to others, it could have deterred bidders. There is nothing to show that the parties to the contract intended anything of the kind. In fact, the agreement could not have prevented bidders. There remain only the questions



whether the facts that the price was paid in Confederate money, and that the notes given for the credit installments were paid on the day when the deed was passed, vitiate the sale?

We attach little or no importance to the fact that the notes were paid on the same day the title to the land was passed, for it appears that the credit was intended for the benefit of the purchasers. The credits were for six and twelve months—the notes bore interest only after four months from the dates of the notes, and it is proved that Confederate notes were worth, at the date of the sale, about two for one in gold, or nearly as much as United States treasury notes.

It is contended that there can "be no valid sale without a price, and that price in current money, and that Confederate notes were not a price in current money, or money at all," and that the sale to the Messrs. Jacobs was therefore invalid.

The answer is that it was a judicial sale, made in good faith and in accordance with "existing laws" in 1863, and it was fully executed.

Articles 127, 128 and 149 of the Constitution, construed together, mean that contracts or obligations for Confederate money or notes are reprobated—those which are executed can not be set aside, and those unexecuted can not receive the aid of the courts to enforce them. Parties interested or affected by such contracts are left without any remedy—they can not invoke the aid of the courts to adjust their differences. *Lee v. Taylor*, 21 An. 514; *Smith v. Henderson*, 23 An. 649, and *Allen v. Cutliff and Husband*, 23 An. 614.

In regard to the cotton, the plaintiffs have failed to establish their demand. If a sale of the cotton was made to defendants, as contended by plaintiffs, it was fully executed, and the defendants are protected by article 149. If it was only left with defendants as security for a loan, the evidence preponderates in favor of the defendants' allegation—that it was destroyed or lost through no fault of theirs.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs of appeal.

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TALIAFERRO, J., *dissenting*. Fraud vitiates all contracts, and when made apparent the law relieves innocent parties who have been affected by it. It matters not whether the contracts are executory or executed. Article 149 of the State Constitution in declaring that executed contracts entered into between the twenty-ninth of January, 1861, and the adoption of the Constitution shall have efficacy, announces as a condition of their having force and vitality that they shall have been entered into in good faith. The sale of the property of Brown's estate was made within the period specified in that article, but in my judgment it was made in fraud, and therefore should be held

invalid. The fraud is, to my mind, patent. Conduct such as that of the administrators of this estate should have no countenance from courts of justice. They deliberately enter into a private agreement for a sale of the property to the purchasers, and bind themselves individually and personally to perfect the title to them. They move in the matter from no outside pressure of creditors. No creditor was importuning them for payment. The heaviest debts against the estate were in New Orleans. About two-thirds in amount of all the debts were held by creditors residing there. The administrators were not only not called upon to take order in regard to the payment of the New Orleans creditors, but they could not lawfully do so. Had those creditors been in a position to speak for themselves they would have ignored emphatically the industry used by the administrators to procure Confederate money to pay their debts. The other creditors representing less than half of all the debts, and who were in a situation to urge their claims, were not doing so. They were quiescent, doubtless not wishing to be paid in the only currency with which they could have been paid at the time. But suppose they had been clamorous and demanding a sale of property, there was a sufficient amount of personal property to pay them, and it was the duty of the administrators to have it sold first, and not to have sold the land. But they were personally and individually bound to make the purchasers a good title, and they were the machinery of the law to fulfill their private engagements to sell the property of the estate. They petition for a sale, representing that the estate was in debt, but they present no schedule, no evidence whatever of the fact, and the order of sale was rendered without evidence that there was at the time any necessity for it. A witness who attended the sale says he would have bid more for the property than it sold for, but he understood that his friends, the administrators, were bound to the purchasers that they should have the property for the amount stipulated, and he therefore did not interfere. The administrators set up as a reason for the sale that it was advisable to sell the plantation on the river and purchase a place back in the hill country, to remove the slaves to keep them out of the reach of the Yankees.

In the matter of selling the property of estates, it is the province of administrators to deal with matters of necessity rather than with matters of expediency. The property belongs of right to the heirs of Brown, then minors. If no necessity existed for the sale of it—and certainly none is shown—it could only have been sold on the ground of expediency, as being for the interests of the minors, and for their benefit and advantage; and of this the tutor, with the advice and authorization of the minors' relatives, assembled in family meeting, were to determine, and not the administrator. In no sense can it be

shown that this fraudulent sale of the property of the helpless minors has resulted or could have resulted otherwise than disastrously to them. Had their property not been sold they would have had at the close of the war the same opportunity that all others involved in the same calamity had—that of compromising their debts, getting time to pay them, and to save a large and valuable plantation, now irretrievably lost by the fraudulent acts of administrators grossly abusing the trust confided to them, and acting in violation of law. It would be no excuse to say that their debts were paid by the operation, if such were the fact. But it is not true that the debts have been paid. There are unpaid creditors still, and for large amounts. One of these is a party plaintiff in this case asking redress.

Litigants are not heard in courts of justice to allege their own turpitude, and parties who enter into engagements reprobated by law, and come into the halls of justice to have them enforced, are left as they are found, and are properly denied audience. But the parties seeking redress in this case come into court with clean hands. They are not seeking relief from any reprobated act in which they have participated. They complain of fraudulent acts to their serious injury by other parties. The heirs of Brown complain that they have been divested of their property by the unlawful acts of persons not authorized to represent them. They show that the administrators, as the representatives of the estate, made themselves busy in the matter of getting up the sale of their property when there was no necessity or call for it, and that their conduct throughout has been fraudulent and deleterious to their interests.

The brothers Jacobs bought the property with full knowledge of the illegal conduct of the administrators. This is shown by their becoming parties to the written agreement by which the administrators were bound personally and individually to make them the title for a fixed price, to be paid in Confederate money. This agreement was the main transaction by which these men were to become owners of the property. The machinery of the law, as it was arranged, was to be used merely to give it the very thin veil of a legal proceeding. The agreement was dated December 5, 1862. The administrators presented their petition to the probate court of the parish of Bossier, on the eighth of that month, for a sale of the property precisely on the terms agreed upon. It turned out that the purchasers were the only bidders at the sale. It is in proof that the idle formality of presenting notes was gone through with. The purchasers, eager to get rid of the depreciated currency they were no doubt overstocked with, paid off with it the whole amount of this nominal price. These men are merchants—men of intelligence and shrewdness. Looking to coming events they saw approaching and distinctly visible in the distance the utter worth-

lessness of the prevailing currency. To vest it in valuable plantations was most desirable. Accordingly we find them active and industrious in seeing that the preliminary steps were all properly taken by which the administrators were to be guided in carrying out their part of the programme.

This transaction is not, in my judgment, covered by the provisions of article 149 of the State Constitution. The whole proceeding should be set aside as null and void, and the property declared to belong to the estate of Brown.

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No. 305.—R. B. SADLER, Tutor, et.al. v. G. W. KIMBROUGH, Administrator—WALKER & VAUGHT, Intervenor.

In this case the wife died, leaving an estate consisting of the community with her husband, who took charge of it without any formal administration other than that of having an inventory taken. The surviving husband continued to manage the entire estate as his own property up to the time of his death, some years thereafter, and contracted debts with commission merchants and others. After his death the heirs instituted suit against his estate for their interest in the succession of their mother.

The creditors intervened and claimed to be paid first, on the ground that their debts bore against the community.

Held—That the husband having taken possession of the entire estate, without any formal authorization, and used it as his own up to his death, his estate was bound for all debts which existed against the community at the time of its dissolution by the death of the wife.

Held further—That the heirs can only claim against the creditors the residuum after they are paid.

**A**PPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J. D. C. Morgan*, for plaintiffs. *C. F. Dunn*, for defendant. *Todd & Brigham*, for intervenors and appellants.

HOWELL, J. Mrs. C. N. Ward, wife of W. R. Ward, died on eighteenth March, 1867, leaving a husband and four minor children. On the fourth of May, 1869, an inventory of the property belonging to the community between the said husband and wife appears to have been made, showing, at the latter date, real estate appraised at \$11,500, and personal effects (including \$5186 61 cash, described as being on hand at the date of the wife's death) appraised at \$23,757 50. All of said property remained in possession of the husband and was used by him until his death, on the eleventh of September, 1869, when G. W. Kimbrough was appointed his administrator. It is admitted that one tract of land belonging to the community was, by order and judgment of the parish court, partitioned between the heirs of the wife and the succession of the husband. On the tenth of October, 1870, the heirs instituted this suit against the administrator of their father to recover judgment for \$12,867 50, as the amount due them from the succession of their mother, composed of half the proceeds of the undivided half of a certain tract of land sold by the administrator,

and one-half of the inventoried value of the personal effects, and for the recognition and enforcement of their legal mortgage on the land belonging to the succession of their father, and their lien and privilege on one-half of the proceeds of the land sold, now in the hands of the administrator, and that they be declared the owners of the land and improvements partitioned to them. The administrator answered by a general denial, qualified by admissions with reference to the alleged partition and the sale of the land mentioned, denying that all the personal property embraced in the above inventory came into his hands, and averring that the total value of all the property, real and personal, which came into his possession, did not exceed \$12,000, and that many of the rights and credits described in said inventory were worthless.

Walker & Vaught, commission merchants, intervened, alleging themselves to be creditors of the succession of Ward for \$8063 11, besides interest; that the indebtedness is also a charge against the community that existed between Ward and his deceased wife; denying that the succession of Ward was indebted to the plaintiffs in any amount; that they had any cause of action against the succession, or that their claim was based on any legal demand whatever; averring that it was purely a fictitious one, and collusively devised between the plaintiffs and the defendant to defraud intervenors and other creditors; that the community was largely in debt at its dissolution; that there has been no settlement thereof, and denying that plaintiffs can claim anything growing out of their interest therein until a settlement thereof is made; and praying that their demand be rejected. The answers of the plaintiffs and defendant to this intervention are substantially a general and special denial of the allegations and demand of the intervenors. Judgment was rendered in favor of plaintiffs against the defendant for \$11,878 75, with legal interest from eleventh of September, 1869, and a legal mortgage on the lands of W. R. Ward's succession, to take effect from the eighteenth of March, 1867, and on the proceeds of any of such lands now in the hands of defendant—reserving to the plaintiffs the right to establish their title to the lands set forth as acquired by the alleged partition, and rejecting the demands of the intervenors; from which judgment the intervenors alone appealed.

The first question presented is, are the intervenors creditors of the community which existed between Mr. and Mrs. Ward? This question was not decided in the case of *Walker & Vaught v. G. W. Kimbrough*, administrator, R. B. Sadler, tutor, et al., intervenors, 23 An. 637, as suggested by plaintiffs' counsel. The language of the court on the subject was used in reference to the right of the intervenors in that case to introduce evidence in support of their intervention, and not

the question whether the plaintiffs therein held a debt against the community between Ward and wife. There is no evidence that the succession of Mrs. Ward had ever been administered. On the contrary, the property of the community remained in the possession and use of the husband until his death, when such as then existed passed into the hands of the defendant Kimbrough, as the administrator of Ward, who proceeded with the administration of the whole without distinction; and in his accounts, found in this record, there are debts which originated prior to the death of Ward's wife. The account sued on in this action was opened prior to that event, at which date the indebtedness was about \$10,798 68. It was an account made by Montgomery, Peterkin & Co., a commercial firm, of which Ward was a member, with Walker & Vaught, commission merchants, and extended from January 9, 1867, to February 12, 1869, and on it a judgment has been rendered against the succession of Ward for the balance of \$7227 19 with interest, to be paid in due course of administration. For the indebtedness on said account at the date of Mrs. Ward's death, the community was liable, but it is entitled to the benefit of all credits properly imputable to its liability or indebtedness. It is liable because the obligation was contracted by its head during its existence.

It is not released by the suit of Walker & Vaught v. Kimbrough, administrator, because the succession of Ward, as administered, embraced the property which belonged to the community, and no steps had been taken to separate the two successions, and Walker & Vaught may well have believed that they were pursuing the property of the community.

An examination of the account of Walker & Vaught and the evidence in the record brings us to the conclusion that they (Walker & Vaught) are entitled to payment from the community of the amount of said account, due on eighteenth March, 1867, subject to the payments made by Ward himself subsequent to that date, to wit: \$2079 01 on twenty-fourth April, 1867; \$1393 73 on thirty-first May, 1867, and \$1185 87 on twelfth February, 1864—such payments enuring, it is presumed, to the benefit of the community. This sum should be paid before the plaintiffs can take any portion of the community, or recover anything from the succession of their father, their rights derived from their mother not attaching to the prejudice of those who were creditors of the community at the date of its dissolution. But we do not see how we can disturb the judgment as between the plaintiffs and defendants, who are both appellees. The only concern of the intervenors is to be paid out of the community property in preference to the plaintiffs. If paid, it is no concern of theirs how much the plaintiffs recover. The rights of two successions can not be settled on this appeal. The proceedings, we must remark, are somewhat unusual;

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but on the prayer of the petition of intervention for judgment in favor of intervenors and for general relief, we may set aside or regulate the judgment appealed from, so far as it affects intervenors, and order that their claim, to the extent allowed herein, be paid out of the community property before the plaintiffs are paid.

It is therefore ordered that the judgment appealed from, rejecting the claims of the intervenors Walker & Vaught, be reversed; and it is now ordered that their claim against the community, which existed between W. R. Ward and his wife, Mrs. C. N. Smith, both deceased, be recognized herein to the extent of six thousand one hundred and forty dollars and seven cents, with legal interest from twelfth February, 1869, and that it be paid, with costs of intervention, in due course of administration, out of the property or its proceeds and funds of said community, in preference to any claim of plaintiffs to or against the estate of said community or either spouse.

Costs of appeal to be paid by appellees.

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No. 274.—L. TEMPLEMAN, Curator, v. C. M. PEGUES, Curator.—F. W. DANIEL, Intervenor.

This suit is brought by the vendor for the resolution of the sale of a tract of land, on the ground of the non-payment of the price. The vendee answered that the notes given for the price were prescribed, and their payment could not be enforced, and the right to the resolution of the sale no longer existed.

Held—That the right to have the sale dissolved and to recover back the property for non-payment of the price, was a distinct and independent right from that of enforcing payment of the notes, which was only prescribed by ten years. That it being a distinct and independent right, and not an accessory of the notes, it could be maintained, notwithstanding the notes held by the vendor for the price were prescribed and could no longer be enforced.

**A** PPEAL from the Tenth Judicial District Court, parish of Caddo. *Levisse, J. Nutt & Leonard*, for plaintiff. *Land & Taylor*, for intervenor. *James S. Ashton and Egan, Williamson & Wise*, for defendant and appellant.

WYLY, J. The case is correctly stated by plaintiff's counsel, and is the following :

The plaintiff, as a curator of the vacant succession of J. R. J. Daniel, instituted this suit against the defendant, the curator of the succession of Junius Daniel, in order to set aside the sale of a large tract of land situated in the parish of Caddo, made by the said J. R. J. Daniel to the said Junius Daniel, on the second day of April, 1859, on account of the non-payment of the purchase price. Plaintiff alleges that the consideration of said sale was the five promissory notes of the said Junius Daniel, and that no payment whatever has been made thereon. He files said notes as a part of his petition, and prays for dissolution of the sale and the restoration of the lands to the succession of J. R. J. Daniel.

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Templeman, Curator, v. Pegues, Curator.

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Mrs. F. W. Daniel intervened in the suit as the surviving widow in community of J. R. J. Daniel, deceased, and attacked the sale on the ground that it was null and void in law, because it was in fact a donation in disguise of real estate belonging to the community existing between herself and her said deceased husband, and was intended to deprive her of her just rights in said community property. She prays for an annulment of the sale and the restoration of the lands to the succession of J. R. J. Daniel, and for a recognition of her community rights, subject to administration.

Defendant, in his answer, "admits that on the second day of April, 1859, Junius Daniel purchased, by public act passed before Thomas H. Pitts, recorder of Caddo parish and *ex officio* notary public, certain lands and negroes, for which he executed his five promissory notes, each for the sum of three thousand dollars, with six per centum interest thereon from date, said notes being of even date with said act of sale, and severally due one, two, three, four and five years after date; to which act of sale special reference is made for greater certainty, and is hereto attached and made part hereof." Defendant further answering, avers that the notes given for the purchase price became the property of Junius Daniel, and after his death fell into the hands of his administrator, J. R. J. Daniel; and further answering, pleads the prescription of five and ten years.

The answer of defendant to the petition of intervention is a general denial.

Upon these pleadings the parties went to trial, and there was judgment for plaintiff, dissolving the sale with a recognition of intervenor's community rights.

From this judgment the defendant appealed. The leading question in this case is, can a sale be dissolved if the notes for the price are prescribed? It is the first time we are aware of that this point has been presented for adjudication to this court. On general principles we think it can not.

The seller having conveyed the title and delivered the thing, has executed his obligation arising in the contract of sale. The buyer executing notes for the price, defers till their several maturities the execution of his obligation to pay the price.

Now, the foundation of this action is the failure or refusal of the buyer to discharge his obligation to pay the price. R. C. C. 2561.

The court is applied to for a remedy on account of this failure to discharge the leading obligation of the buyer. The remedy appertaining to this obligation invoked by the plaintiff is to order the resolution of the sale. This is just as legal a remedy as to order the payment of the price. Either would be a complete discharge of the obligation to pay the price. It is in the discretion of the court to give



the order in the alternative, decreeing the payment of the price in a specified time, or on failure thereof, ordering the dissolution of the sale. R. C. C. 2562.

There are, therefore, two modes by which the legal obligation of the buyer may be discharged. R. C. C. 2549, 2561. But if the obligation to pay the price evidenced by the notes be already discharged, we do not see that the court can grant either remedy. R. C. C. 3540.

There are several modes of discharging legal obligations, and one is as complete and effectual as the other. R. C. C. 2130. Prescription, compensation or voluntary remission extinguishes a legal obligation as thoroughly as payment. There is no difference in the effect. The operation of either is utterly destructive of the juridical necessity imposed on the obligor. Now, if the obligation to pay the price evidenced by the notes be extinguished by prescription, it is no longer a legal obligation; it may be a natural obligation, but this can not be a cause of action. R. C. C. 1757.

We can not enforce the obligation of the buyer to pay the price in the case before us by ordering the resolution of the sale, because that legal obligation has already been discharged. R. C. C. 3540. The effect of the dissolving condition is one of the modes provided by law to extinguish legal obligations. R. C. C. 2130. Now, a legal obligation that has already become extinguished by prescription need not be again discharged by the effect of the dissolving condition, if the discharge of a legal obligation by one mode be as efficacious as by another. An obligation that has been compensated or voluntarily remitted need not be paid in order to discharge it, and the court will not compel the performance of an obligation already discharged in one of the modes provided by law.

If the sale before us be dissolved, what legal obligation will be discharged by the effect of the dissolving condition? Surely not the obligation to pay the price. That has been already extinguished by prescription. The application of a legal remedy always discharges a legal obligation in whole or in part; it is never applied to enforce a natural obligation. By the textual provisions of our law the effect of the dissolving condition is laid down as one of the modes of extinguishing legal obligations. R. C. C. 2130.

There is no legal obligation in the case before us to be executed, or remaining to be discharged, but the obligation of the buyer to pay the price. R. C. C. 2549. That is the cause of complaint. It is the obligation sought to be enforced. But that has now ceased to be a legal obligation. By the lapse of time its payment is implied or presumed. It is the interest of the commonwealth that litigants should be compelled to prosecute their demands in the time limited in the statutes of prescription. If they fail to do so, the law declares the obligation

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discharged on the presumption of payment, arising from their long delay in not complaining of the want of payment. R. C. C. 2130, 3540.

We think the remedy of the resolution of the sale should not be granted, because if ordered it would not discharge the legal obligation of the buyer to pay the price (the only unexecuted obligation there was in the act of sale), because that obligation has already been discharged as effectually by prescription as if it had been paid.

After the notes were prescribed the defendant was no longer in default for the price; the obligation to pay the price was no longer binding on him. R. C. C. 3540, 3541. The resolution of the sale can not be invoked in the absence of the obligation binding the buyer to pay the price. R. C. C. 2561.

The seller having conveyed and delivered the thing, and the obligation of the buyer to pay the price having become extinguished according to law, the contract of sale is entirely executed; there remains nothing to be enforced.

In view of our conclusion on the question of prescription it becomes unnecessary to examine the other points presented in this case.

It is therefore ordered that the judgment herein be avoided and annulled; and it is now ordered that the demand of the plaintiff be rejected, with costs of both courts. It is further ordered that the intervention herein be dismissed at the costs of the intervenor.

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#### ON REHEARING.

LUDELING, C. J. The plaintiff, as curator of the vacant succession of J. R. J. Daniel, instituted this suit against the defendant, the curator of the succession of Junius Daniel, in order to set aside the sale of a large tract of land situated in the parish of Caddo, made by J. R. J. Daniel to said Junius Daniel on the second of April, 1859, on account of the non-payment of the purchase price. Plaintiff alleges that the consideration of said sale was the five promissory notes of the said Junius Daniel, and that no payment whatever has been made thereon. He files said notes as a part of his petition, and prays for dissolution of the sale and the restoration of the lands to the succession of J. R. J. Daniel.

Mrs. F. W. Daniel intervened in the suit as the surviving widow in community of J. R. J. Daniel, deceased, and attacked the sale on the ground that it was null and void in law, because it was in fact a donation in disguise of real estate belonging to the community existing between herself and her said deceased husband, and was intended to deprive her of her just rights in said community property. She prays for an annulment of the sale and the restoration of the lands to the succession of J. R. J. Daniel, and for a recognition of her community rights, subject to administration.

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 Templeman, Curator, v. Pegues, Curator.
 

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Defendant in his answer "admits that on the second day of April, 1859, Junius Daniel purchased, by public act passed before Thomas H. Pitts, recorder of Caddo parish and *ex officio* notary public, certain lands and negroes, for which he executed his five promissory notes, each for the sum of three thousand dollars, with six per centum interest thereon from date; said notes being of even date with said act of sale, and severally due one, two, three, four and five years after date; to which act of sale special reference is made for greater certainty, and is hereto attached and made part hereof." Defendant further answering, avers that the notes given for the purchase price became the property of Junius Daniel, and after his death fell into the hands of his administrator, J. R. J. Daniel; and further answering, pleads the prescription of five and ten years.

The answer of defendant to the petition of intervention is a general denial.

There was judgment for the plaintiff, dissolving the sale and recognizing the intervenor's community rights in the property restored to the succession.

From this judgment the defendant has appealed.

The principal question for solution in this case, on the rehearing, is whether an action for the dissolution of a sale for the non-payment of the price can be maintained if the notes given for the price be prescribed? We have just decided, in the case of *Joseph T. Swan v. Ann L. Gayle, administratrix*, that the right to dissolve a sale for the non-payment of the price is not an *accessory* of the notes given for the price, and has no connection with them. It is a distinct and independent right conferred by law not to enforce the payment of the price, but to *recover back the land* for the non-fulfillment of the obligation of the buyer. It is chiefly when the collection of the notes can not be enforced that this right is valuable. It is based upon the equitable principles that "no one shall enrich himself at the expense of another," and that when one party to a contract fails to discharge the obligations assumed by himself, the other party has a right to be released from his obligations growing out of the contract.

"Cette doctrine place le vendeur dans une position extrêmement favorable: il peut presque sans péril, négliger son action en paiement et le privilège qui s'y trouve attaché; car s'il perd le prix, il reprendra la chose en faisant réscindre le contrat." Duvergier's Toul. Droit Civil, vol. 9, No. 442; liv. III. tit. VI de la Vente. And the same learned jurist adds, at No. 443: "Après avoir montré que les droits dont est armé le vendeur sont indépendants, en ce sens que la négligence en l'abandon de l'un n'a point d'influence sur l'existence de l'autre; il faut voir comment et dans quels cas la demande en paiement serait un obstacle à la demande en résolution et réciproquement."

If, then, the right to sue for a dissolution of the sale be a distinct and independent right, having for its object something totally different from the enforcement of payment of the notes, we fail to perceive why that right should be affected by the prescription of the notes. In fact it has been repeatedly held by this court that the right to sue for a dissolution of the sale on account of the non-payment of the price was prescribed by ten years. *George, curator, v. Lewis*, 11 An. 655; 1 An. 442, *James v. Crocker*; 16 An. 129, *Hunter v. Williams*; *George v. E. A. Knox, Husband et al.*, 23 An. 355. C. C. 3508.

These decisions would seem to indicate also that the right to sue for a dissolution of the sale was not an *accessory* of the note, otherwise the prescription or *extinction* of the accessory would depend upon the *extinction* of the *principal* obligation. The question of *registry* is not involved in this case, and the inconvenience alluded to in argument was noticed and disposed of in the case of *Johnson v. Bloodworth*, 12 An. 701. In that case this court said, "Registry laws are artificial rules—the creatures only of positive legislation. \* \* \* They have seldom if ever been extended by judicial construction to cases not within their plain and obvious intendment."

We are satisfied that we fell into error in our former opinion in this case in noticing the fact that the notes were prescribed, when that fact was not pleaded, as well as in holding that the right to sue for the dissolution of the sale was an *accessory* to the notes and perished with them.

The dissolution of the sale will restore the property to the vendor or owner, which in this instance was the community of acquets and gains existing between J. R. J. Daniel and Mrs. F. W. Daniel. C. C., art. 2045.

It is therefore ordered and adjudged that the decree heretofore rendered by this court in this cause be set aside, and it is decreed that the judgment of the lower court be affirmed, with costs of appeal.

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HOWE, J., *dissenting*. In my opinion our decree should remain undisturbed. The right to dissolve is accessory, and falls with the principal obligation. 2 N. S. 158; *Rogron's C. N.* 1692; *Duvergier's Toullier*, vol. 17, 275.

Notes given for the price contain in themselves the obligation to pay the price. If they are paid the price is paid. If they are prescribed the price is prescribed. The obligation to pay the price in this case is extinguished by prescription, and there remains only a natural obligation to pay it. Do we purpose to enforce natural obligations by suit?

Again, the right to dissolve may be enforced against a third possessor. 12 An. 699; *Paillet's C. N.* 422.

A sells a plantation to B and takes his note for most of the price at one year, with mortgage and vendor's privilege. Seven years after he sues for the amount of the note and for recognition of mortgage and privilege. B pleads prescription, and has judgment in his favor declaring the note prescribed and refusing to recognize the mortgage and privilege because they are extinguished also. B takes a rule and has the mortgage and privilege erased. C comes along and examines the title and finds it free and clear of all incumbrance. (We are an enlightened people and require all incumbrances to be recorded.) He buys and flatters himself that he is safe. Two years after A sues to dissolve. C pleads prescription, as in this case, and points to the judgment between A and B and the clean record in the mortgage office. But A replies that the action to dissolve still exists—wandering about like a disembodied evil spirit—and so the sale is dissolved.

Would this be just? Is it sound on elementary principles? Is it in accord with our registry laws? Is it not a trifle worse than the system of unrecorded tacit mortgages from which we boast a recent deliverance?

WYLY, J. I adhere to the former opinion of this court in this case.

No. 333.—R. W. TURNER, Under Tutor, v. B. F. O'NEAL, Sheriff, et al.

A second note given by the husband after the dissolution of the community by the death of the wife, in renewal of a note which he had given before the dissolution of the community, is not a novation of the first note, and the heirs of the deceased wife have no mortgage on their mother's share of the community property which they can urge as against a creditor who is seeking to enforce payment of the last note by seizure of the property which belongs to the community.

The plea of prescription against a note, based on the ground that the previous note for which it was given in renewal was prescribed at the time it was given, will fail if the evidence does not disclose the date of the first note.

**A**PPEAL from the Eighteenth Judicial District Court, parish of Bossier. *Watkins, J. Looney & Ashton*, for plaintiff. *Griffin & Snider*, for defendants in injunction, appellees.

LUDELING, C. J. In 1858 R. Y. Graves married Eliza L. Gilmer. In 1859 he borrowed upwards of ten thousand dollars from James W. Vance, for which Graves executed his promissory note. In 1864 Mrs. Graves died. In 1866 R. Y. Graves executed a new note in favor of Vance and took up the old one. Suit was instituted on this last note against R. Y. Graves, and judgment was rendered thereon against him. Execution was issued under this judgment, and the sheriff seized and advertised for sale property belonging to the community of acquets and gains which had existed between Graves and his wife, and an

undivided interest of Graves in certain other tangible property which was in the possession of the heirs of Mrs. Graves. Whereupon the plaintiffs, heirs aforesaid, enjoined the sale, on the grounds—*first*, that they are the owners of the undivided half of the community property seized; *second*, that the undivided interest of Graves in the corn, cotton and other movables can not be seized without injury and damage to plaintiffs, and is therefore illegal; *third*, because their tutor, R. Y. Graves, has never rendered an account of his tutorship; that J. W. Vance was the under tutor, and failed to require the registry of their mortgage, and that their tutor is largely indebted to them, and they have a mortgage on all his real property to secure their debt.

There was judgment in favor of the defendants, dissolving the injunction and ordering the sale of the property subject to the minors' mortgage. The plaintiff has appealed, and the defendants have prayed for an amendment of the judgment which directs the property to be sold subject to the minors' mortgage.

In this court the plea of prescription against the first note is pleaded; that is, that at the time the second note was executed in 1866, the first note had been prescribed, and the community had been dissolved long before.

The only grounds urged in this court by the plaintiff and appellant are that the old note was novated, and that it was prescribed when the new note was executed by R. Y. Graves.

We are satisfied, from an examination of the evidence in this case, that the old debt was not novated by the execution of the new note; it was merely a renewal of the old debt. The intention of the parties is clearly manifested by the statement at the bottom of the paper upon which the new note is written.

We have looked in vain in the record for any evidence showing when the old note matured. There is, therefore, no grounds for the plea filed in this court, as the proof of it does not appear on the face of the proceedings in the lower court. C. P. 902.

We think the judge *a quo* erred in directing the property to be sold subject to the minors' mortgage. Whether the minors have or have not a tacit mortgage on the property is immaterial in this contest, as it could be no ground for enjoining the sale of the property, if it be admitted that the minors have a mortgage—about which, however, we deem it proper to express no opinion in this case.

It is therefore ordered and adjudged that the judgment of the lower court be amended by annulling that part of it which decrees that the property seized "be sold subject to the general tacit mortgage of plaintiffs," and that as thus amended it be affirmed, with costs of appeal.

## No. 252.—L. J. WILLIS v. J. NICHOLSON et als.

In this case property was seized and sold by the sheriff under execution. The purchaser obtained a judgment on monition approving the sale. The defendant brings this action to annul the sale on the ground of want of authority in the sheriff to sell, and that there was no sufficient description of the land adjudicated. The purchaser pleaded the judgment in monition as *res judicata* and a bar to the action.

Held—That the judgment on the monition appearing to be regular in form, all the requirements in such a case having been complied with, it operated as a bar to further proceedings touching its validity; that the defenses urged here of want of description, etc. should have been urged at the trial of the suit for the monition.

**A** PPEAL from the Tenth Judicial District Court, parish of Caddo. *Lerisee, J. A. W. O. Hicks*, for plaintiff. *Nutt & Leonard*, for appellants.

HOWELL, J. This is an action by a judgment debtor to annul a sheriff's sale upon the grounds—

I. Of want of authority in the sheriff to make the sale. *First*, because the sale was enjoined; *second*, because he was instructed by the plaintiff in execution not to sell; *third*, because he had no authority to sell less than he had seized.

II. There was no sufficient description and identification of the land adjudicated.

The defendant J. Nicholson, who was plaintiff, admits the allegations of the petition and joins in the prayer to annul the sale.

The defendant R. L. Gilmer, the purchaser, and his vendee of a part of the land, pleaded the judgment in the case of "R. L. Gilmer, application for monition" (reported in 21 An. 589), as *res judicata*. This and other exceptions not being sustained, and judgment having been rendered on the merits in favor of the plaintiff annulling the sale, Gilmer and his vendee have appealed.

The plea of *res judicata* necessarily involves the consideration of the "monition law" and its applicability to this case.

Its object is declared to be to protect purchasers under sheriffs' and certain other sales from eviction of the property so purchased, and from any responsibility as possessors of the same upon compliance with the prescribed rules; and the judgment on the monition is conclusive evidence that the monition has been regularly made and duly advertised, and the judgment of confirmation "shall have the force of *res judicata* and operate as a complete bar against all persons, whether of age or minors, whether present or absent, who may thereafter claim the property sold in consequence of all illegality or informality in the proceeding, whether before or after judgment, and the judgment of homologation shall, in all cases, be recorded and considered as full and conclusive proof that the sale was duly made according to law, in virtue of a judgment or order legally and regularly pronounced on the interest of parties duly represented. An exception is expressly

made, that the law shall not be construed "so as to render valid any sale made in virtue of a judgment when the party cast was not duly cited to make defense," and the recourse of minors in certain cases is preserved. R. S., sections 2370, 2380.

Whatever may have been heretofore said, or may now be said in regard to the effect of a judgment on a monition upon what may be termed radical defects, we think it clear that the judgment on the application of Gilmer for a monition in this instance is a bar to this action. It was clearly the duty of the plaintiff herein, who does not allege a want of citation in the suit against her, to make herself a party to that proceeding, and urge all the grounds of opposition which she might or could have. She was manifestly within the category of persons affected by the notices required to be given and concluded by the judgment in said proceedings. Under the language of the law the thirty days notice applies to "all persons who can set up any right to the property, in consequence of any informality in the order, decree or judgment of the court under which the sale was made, or any irregularity or illegality in the appraisal and advertisement in time and manner of sale, or for any other defect whatsoever." The defects urged by the plaintiff are the want of authority in the sheriff for specified reasons and the want of a sufficient description and identification of the property. We think there can be no doubt that there are defects of and within the proceedings resulting in the sale, which should have been urged by plaintiff in opposition to the monition. The presumption of law is that the sheriff had in his hands the writ of execution, which was his full, legal authority, to make the sale, and if that authority was revoked or suspended this fact, as well as any defect of description, should have been set up and established in the monition proceedings.

Mrs. Nicholson having been a party to said proceedings is certainly bound by them.

We think the plea of *res judicata* should have been sustained, and plaintiff's action dismissed.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of R. L. Gilmer and R. White, on their plea of *res judicata*, dismissing plaintiff's action at her costs, in the lower court. Costs of appeal to be paid by the appellee.

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TALIAFERRO, J., *dissenting*. I adhere to what I conceive to have been the construction heretofore given by this court to the monition act of 1834, reenacted in 1855. It has been held to relate only to informalities in decrees ordering or proceedings connected with judicial sales; it extends but to matters of form, and not to those *dehors* the



proceedings. 16 La. 590. In Robert et al. v. W. W. Brown et al., 14 An. 597, where the question was as to the validity of a sale made without an order of court, and the prescription of five years under the act of 1834, reenacted in 1855, was set up in bar of the plaintiff's claim to the property, the court was of the opinion "that this statute does not cure the total want of authority to sell, but merely irregularities and informalities in the execution of the decree or other sufficient authority to sell." The scope and purpose of the monition law, I think, are clearly defined by Chief Justice Eustis in the case of the City Bank of New Orleans v. Walden, 1 An. 46. The learned judge said: "The monition act of 1834, under which the present proceedings are instituted, was passed for the protection of *bona fide* purchasers at judicial sales from litigation concerning matters of form, a non-observance of which by public officers frequently exposed purchasers to unreasonable and vexatious suits. The difficulty of administering and preserving proofs of the observance of formalities rendered cases of this kind, in the hands of the unscrupulous, the instruments of great annoyance and expense to those who had purchased and paid for property exposed for sale under the authority of our courts. This law relates to informalities in the decrees under which judicial sales are made, and to irregular, illegal and defective proceedings connected with the sales. We do not understand the operation of this act to extend beyond matters of form, nor that it purports to operate on any matter *dehors* the proceedings." See also 2 An. 208.

In the case now before us I think there was a sale made of the plaintiff's land without even the shadow of authority. The injunction taken out by the plaintiff to prevent the sale of her property, commanded the sheriff not to make sale of it. He was directed both by the plaintiff's agent and her attorney at law not to proceed with the sale. These directions were disregarded. It is said on the part of the defendants Gilmer and White, that these instructions from the agent and the attorney at law were verbal, and that the sheriff was not bound to regard them. I know of no law requiring such instructions to be given in writing under pain of nullity. The judgment creditor has the right to control his judgment and may, under the rules of the law, give directions as to the time of its execution. The sheriff, who is the mere minister of the law, has no discretion in such a case, and must regard the wishes of the creditor controlling the judgment when instructed to suspend or postpone a sale of the debtor's property. The views here expressed are, I think, fully borne out and sustained by the decision of this court in the case of Williams v. Gallien, 1 Rob., p. 95. In that case a sale of valuable property was made in disregard of the plaintiff's repeated instructions to forbear selling the defendant's property, even after he had seen the sheriff's advertisement of sale.

In that case Judge Martin, the organ of the court, held that the judgment was the property of the plaintiff, and that the sheriff had no right in violation of the orders of the plaintiff or his attorney to sell the property seized, and the sale was annulled. The doctrine announced in that case was again asserted distinctly in a parallel case in 9 Robinson, p. 77, *Spencer, tutrix, v. Conrad, administrator*.

There are two defects existing in the proceedings by which the sale in question was effected that, in my judgment, can not be referred to the class of "irregularities and informalities" that may be cured by monition, and these are want of authority in the sheriff to sell, and want of description of the property sold. In regard to the latter I quote the authority of the case of *Dodeman v. Barrow*, 10 An., p. 193, and the case of *M. Gernon v. W. W. Handlin*, 19 An. 25, and also the case of *Brooks v. Workman*, 22 An. 491.

I think the judgment of the district court should be affirmed.

NO. 258.—*LAURA J. WILLIS v. J. NICHOLSON et al.*—T. M. GILMER, Intervenor.

A person who alleges that he has an interest in a judgment that has been enjoined, who was not a party, either directly or indirectly, to the suit in which the injunction was granted, and shows no transfer or subrogation, can not control the execution of such judgment.

**A**PPEAL from the Tenth Judicial District Court, parish of Caddo. *Levisse, J. A. W. O. Hicks*, for plaintiff and appellee. *Nutt & Leonard*, for defendants and appellants.

**HOWELL, J.** This is an injunction suit, in which the facts material to the issues presented are as follows:

In the case of *Nicholson v. Willis*, execution issued and the sheriff seized 480 acres of land. Willis claimed a homestead and obtained an injunction of the sale of 160 acres of the land seized; the sale of the balance was made, and subsequently the injunction was dissolved. Pending the proceedings, Nicholson transferred the judgment to John Hendricks, Sr., who, after the dissolution of the said injunction, caused an *alias fi. fa.* to issue on the unsatisfied portion of the said judgment and the 160 acres of land to be seized; whereupon the debtor in the said writ instituted this suit to enjoin the sale, on the ground that Nicholson, the plaintiff in the judgment, and in whose name the writ issued, claimed to be the owner of the judgment, and had notified her not to pay to Hendricks; and she made Nicholson and Hendricks parties. Nicholson answered, admitting the allegations of the petition, averring that she had sued to annul the transfer of the judgment to Hendricks, on the ground of fraud, and joined in the prayer for the perpetuation of the injunction. The said transfer was annulled by a judgment which was affirmed on appeal; and afterwards T. M. Gilmer

intervened in this suit, claiming to be the owner in good faith of an undivided half of the said judgment by purchase from Hendricks, asserting his rights as against all parties (including the control of the execution), and praying to be declared the owner of one-half of said judgment, and for the dissolution of the injunction so far as it affects his rights.

Upon trial, after issue joined on exceptions and answers, judgment was rendered, perpetuating the injunction against Hendricks and Gilmer, and condemning them to pay costs, from which only Gilmer, the intervenor, appealed.

His counsel say the contest is really between him and the defendant Josephine Nicholson, and that the injunction was perpetuated on the ground that the transfer from Hendricks to Gilmer was without effect until notice of transfer had been given to the debtor Laura J. Willis. They contend that Mrs. Nicholson, in consequence of her transfer to Hendricks, and his transfer to Gilmer, who acquired in good faith, is absolutely divested of one-half of her judgment; while it is contended on the other side that Gilmer acquired no better title than his assignor and Hendricks had; and as it has been adjudged that Hendricks never had any title to the judgment, Gilmer never acquired any to the half thereof. It is well to state here that the written act of transfer from Mrs. Nicholson to Hendricks, of which Gilmer had knowledge, indicates by its terms that the transfer was intended to enable Hendricks to use it for some specific purpose; that Gilmer was aware of the contest about the sale of land, which had been made under the judgment, the result of which, if the said sale should be annulled, was to enure to the benefit of Mrs. Nicholson, and that the transfer from Hendricks to Gilmer was merely a verbal agreement between them, of which there was no record whatever. Under these circumstances we do not think Gilmer can invoke the equitable rule that, where one of two innocent parties must suffer a loss, he must bear it who put it in the power of another to cause the loss; but that the rule above invoked against him must apply. 18 An. 412. Mrs. Nicholson never intended to part with the title to her judgment, and as a matter of fact never did part with it; and what transpired between Hendricks and Gilmer can not be held to operate a divestiture of any portion of her title. The judgment is her property and subject to her control, and she does not complain of the decree in this case perpetuating the injunction.

But if it should be admitted that Gilmer has an interest in the judgment enjoined, not being in any way directly or indirectly a party to the record in which it was rendered, and no act of subrogation in his favor being on file, he can not control the execution of the said judgment. 5 N. S. 707; 9 An. 174; 1 R. 94; 9 R. 77.

**Judgment affirmed.**

No. 324.—SUCCESSION OF JOHN LILES, SR.—Provisional Account of Executor.

A creditor of a succession who accepts notes and obligations in favor of the estate as collateral security to collect and apply to his debt must, in order to escape responsibility, collect them, or show the causes which prevented him. By a failure to collect such notes or show any good reason why he did not do so, the amounts will be charged to him by the executor, and if the amount is equal to his claim against the estate, compensation takes place, and as he is no longer a creditor he can not oppose the account of the executor.

**A**PPEAL from the Parish Court of the parish of Ouachita. *Robert J. Caldwell*, parish judge. *B. G. Cobb* and *W. J. Q. Baker*, for executor. *Morrison & Farmer*, for opponent and appellant.

**TALIAFERRO, J.** The dative testamentary executor of Liles, under an order of court, filed a provisional account. It was opposed by *Wade H. Hough*, on the ground that the executor refused to recognize his judgment against Liles for \$2966 66 as a just claim against the estate. The account was also opposed by *Abraham Levi* on the ground that his claim against the estate of Liles for \$7861 27, on which he had obtained judgment against Liles in 1866, had been refused by the dative testamentary executor and not placed upon the account. *Levi* also opposed the judgment of *Hough*, and upon the same ground that it had been rejected by the executor, viz: that it was founded chiefly upon a consideration arising from the price of slaves.

The executor contends that *Levi*, so far from being a creditor of Liles's estate, is in fact a debtor. He shows that the original indebtedness of Liles to *Levi* was extinguished by the failure of *Levi* to collect certain notes for a large amount, upon which judgment had been confessed by one *Hogan*, and which were placed in his hands as collateral security, to collect and apply the proceeds to the discharge of the debt of Liles to *Levi*. On this issue there was much controversy. It was decided, we think correctly, by the judge *a quo* who, in an elaborate opinion, cited various authorities to sustain the doctrine that the creditor receiving collateral obligations to secure his debt must use proper diligence to collect them, and, to avoid responsibility, must show the causes which prevented him. Finding from the facts in evidence no grounds to exonerate *Levi* from this liability, judgment was rendered against him, decreeing that the liability of *Levi*, so incurred, exceeds the debt that Liles originally owed him, and that it is the duty of the executor to collect the excess. C. C. 3002; 1 N. S. 767, 4 An. 301; 1 An. 13; 12 An. 672, 119; 10 An. 98, 69 S. 195. The judgment of *Hough* was decreed to be a valid debt against the estate, and its payment in full was ordered by the court. From the judgment rendered by the court below the executor has not appealed; and coming to the conclusion that *Levi*, who has appealed, is not a creditor

of the estate of Liles, and has no interest to contest the correctness of Hough's judgment, the decree of the lower court must be maintained. Levi further opposed items from one to five on the executor's account. The items one and two were allowed; the amounts as fees to Stubbs & Cobb, and also to W. J. Q. Baker, the court considered as not properly established, and were not allowed; but the right was reserved to establish these claims. The commissions claimed by the executor were allowed. With the alterations made, the provisional account was approved and promulgated.

We think the judgment correct.

It is therefore ordered that the judgment of the parish court be affirmed with costs.

Rehearing refused.

No. 284.—J. F. C. TAYLOR v. DAVID PIPES and J. F. C. TAYLOR v. DAVID PIPES. (Consolidated.)

24	551
48	1185
24	551
116	882

A third person who has purchased property which is incumbered by a mortgage which does not contain the pact *de non alienando* while proceedings are pending by the mortgagee to enforce it, and is in possession under a title translativo of property, can only be evicted by the mortgage creditor by an hypothecary action. C. P., art. 69.

Property thus situated can not be seized under proceedings to enforce the mortgage until it has been declared subject to the mortgage by an hypothecary action; and if it has been seized an injunction will legally issue to protect the third possessor in the enjoyment of his property.

**A** PPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J. Todd & Brigham*, for plaintiff and appellee. *D. O. Morgan*, for defendant and appellant.

WYLY, J. A motion is made to dismiss this appeal:

*First*—Because the amount of the bond is not sufficient for a suspensive appeal.

*Second*—Because only one of the defendants *in solido* has appealed.

*Third*—Because the clerk's certificate to the transcript is not sufficient.

The bond, being for the amount fixed by the judge, is good for a devolutive appeal, if it is not sufficient for a suspensive appeal.

As the appeal was taken by motion in open court and the bond given in favor of the clerk, all the necessary parties are before the court.

The certificate of the clerk we consider sufficient; besides, if insufficient, it is no ground to dismiss the appeal, the fault being attributable to the clerk.

The motion to dismiss is therefore denied.

ON THE MERITS.

The plaintiff Taylor, the third possessor of the mortgaged property, enjoins the enforcement of the mortgage against it, on the ground that the defendant has not brought an hypothecary action against him

Taylor v. Pipes.

conformably to articles 68 and 69 C. P., the mortgage not containing the pact *de non alienando*; and also because execution issued improperly against Tait, the mortgager, in this, there was no notice of judgment served upon him, the judgment being rendered by default.

The defendant contends that as Taylor acquired the property after his suit had been instituted to foreclose the mortgage, he is charged with notice of the proceeding, is not a third person in the sense of the law, and need not be proceeded against conformably to articles 68 and 69 C. P.

This raises the question whether a third person who acquires mortgaged property after suit or judgment against the original owner, can be deprived of it without an hypothecary action being brought against him conformably to the rule stated in articles 68 and 69 C. P. It is elementary that no one should be condemned or deprived of a legal right without a hearing.

If a third person has the right to buy mortgaged property pending the suit to foreclose the mortgage, his right can not be divested without some proceeding contradictorily with him, and the law has provided the kind of proceeding in express terms in articles 68 and 69 C. P.

The law has not prohibited the transfer of mortgaged property, pending the action to foreclose the mortgage. It is only where the ownership of the thing is involved that its alienation is prohibited pending the petitory action.

"The sale of a thing belonging to another is null." \* \* \* Revised Code 2452.

"The thing claimed as the property of the claimant can not be alienated pending the action, so as to prejudice his right. If judgment be rendered for him, the sale is considered as the sale of another's property, and does not prevent him from being put in possession by virtue of such judgment." Revised Code 2453.

In the suit against Tait neither the ownership nor the possession of the property was involved; Pipes simply sought to foreclose his mortgage. The sale to Taylor pending the action was not the sale of another's property by his vendor. It mattered not how the suit resulted, Pipes could not be put in possession. He had only succeeded in getting judgment against Tait and having his mortgage rendered executory. In *Barelli v. Delassus*, 16 An. 283, the question was whether the owner of the mortgaged property could alienate it pending the suit to foreclose the mortgage, and the articles of the Civil Code quoted were examined on that point; and it was held that: "The sum and substance of article 2428 (2453) are that the owner of property, who has sued in revendication, is entitled, upon rendition of judgment in his favor, to be put in possession by virtue of such judgment, even if the defendant has alienated the property during the pendency of the

action. But a party who institutes the hypothecary action can not interfere with the right of the defendant, as owner, to alienate the property during the pendency of the suit, for two reasons: *first*, because, in the words of the article, this is not *the sale of another's property*; and *secondly*, because the plaintiff, however successful, is not entitled *to the possession of the property*."

In *Maskell v. Merriman*, 9 R. 69, the precise question now in controversy was decided, to wit: whether the purchaser of mortgaged property, after suit or judgment against the original mortgager, is entitled to the rights of a third possessor and can only be proceeded against conformably to the rule stated in articles 68 and 69 C. P. It was there held that: "A purchaser of property subject to a mortgage, in possession, is entitled to the rights and *privileges of a third possessor, though a judgment had been obtained by the mortgagee against the mortgager, but no execution had issued before the purchaser took possession under the sale*; it is only when the mortgage contains the *pact de non alienando* that the third possessor is not entitled to notice."

It is not pretended that Taylor took possession after execution had issued against Tit, the mortgager, contradictorily with whom the judgment foreclosing the mortgage was rendered.

Taylor acquired the title and the possession in August, 1866, as appears by the evidence, and the judgment under which the defendant Pipes proceeds was not signed till December, 1868. Taylor was, to all intents and purposes, a third possessor when his property was seized.

In *Williams v. Morancy*, 3 An. 227, it was held that: "Where mortgaged property is in possession of the mortgager, one expressly subrogated to the rights of the mortgagee may proceed against it *via executiva*. But where an act of mortgage contains no clause *de non alienando*, and the property is sold by the mortgager to a third person, neither the mortgagee nor any one subrogated to his rights can proceed against it by order of seizure and sale. *The creditor must resort to an hypothecary action*."

In *Brown v. Routh*, 4 An. 270, it was held that: "Where an act of mortgage does not contain the *pact de non alienando*, and the property is in possession of a third person, *no judgment can be rendered for its seizure and sale in an action against the mortgager alone*."

The same was also decided in *Waddill v. Payne & Harrison*, 22 An. 134. These decisions but apply the textual provisions of the law.

Article 62 of the Code of Practice declares that: "The hypothecary action, like all real actions, follows the property to which it is attached, in whatever hands it may be found, *but it is subject to different rules, according as the property may be in possession of the debtor, of his heirs, or of third persons*."

The rule, where the hypothecated property is in the hands of a third

person, is stated in articles 68 and 69 C. P. It is the only rule applicable to the enforcement of a mortgage on property in the hands of a third possessor, where there is not the non-alienation clause.

"If the hypothecated property be neither in the possession of the debtor nor of his heirs, *but in that of a third person*, the creditor has his action against that person in order to compel him to give up the property, or pay the amount for which it stands hypothecated. This is the hypothecary action properly speaking." C. P. 68.

"If thirty days after amicable demand, made from the debtor or his heirs, of the payment of an hypothecary debt, it has not been fully discharged, the creditor may bring his action against the third possessor of the property hypothecated to him, to have it seized and sold, if that third possessor have not within the ten days after having been notified of such a demand paid the amount of the hypothecary debt, including the interest and costs." C. P. 69.

The plaintiff in this suit, being a third possessor, was entitled to ten days notice of the legal demand made on the mortgager, before the defendant could bring an action against him to subject his property to the hypothecary claim. This is the plain requirement of article 69 C. P.

No notice of the kind was served upon the plaintiff. The defendant simply confirmed a judgment by default against Tait, the mortgager, and had the mortgage rendered executory. And he was attempting, when arrested by this injunction, to alienate the property of the plaintiff by carrying on a sale thereof contradictorily with Tait, who had neither the title nor possession of the property seized.

The plaintiff, a third possessor, found his property about to be sold in a proceeding to which he was not a party, and he caused it to be arrested by this injunction.

A sale made contradictorily with a party who has neither the possession nor ownership of the property seized would seem to be an utter nullity.

But the defendant contends that the rule laid down in articles 68 and 69 C. P. ought not to apply to a purchaser after suit against the mortgager, because it would create endless delay in enforcing mortgages and would enable third possessors, by successive transfers, practically to defeat the law.

We do not see the force of this objection.

If the third possessor, proceeded against under articles 68 and 69 C. P., does not give up the property, he is condemned in the judgment to pay the debt. And so judgment may be had against every subsequent purchaser against whom the hypothecary action may be brought.

The party whose pursuit is sought to be evaded may thus get judgment against every one endeavoring to defeat him.



The judgment under which this seizure was made was a default confirmed against Tait, the mortgager. No notice of judgment was given to him. It is well settled that before an execution can issue where a default has been confirmed, notice of judgment must be served upon the defendant. This is the rule in all cases where the judgment is appealable. C. P. 624; 6 R. 18; 3 L. 237; 21 An. 464.

The defendant, wholly disregarding the rights of the plaintiff, issued prematurely execution on the judgment against Tait, the mortgager, and seized the land owned by the plaintiff.

The plaintiff had the right to resist the sale on the same ground that Tait, the author of his title, could. Were he merely a mortgage creditor, instead of the third possessor, he could plead the prematurity of the writ.

For the reasons stated we think the district judge did not err in perpetuating the injunction and recognizing the plaintiff as the owner of the land. This disposes of the first case. The second of these consolidated cases is in relation to the rent of the property during the seizure.

We think the court did not err in concluding that the plaintiff is entitled to the rent.

It is therefore ordered that the judgment appealed from be affirmed, with costs.

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HOWELL, J., *concurring*. I concur in the reasoning of Mr. Justice Wyly, except on the question of notice of judgment to Tait, upon which I think it unnecessary to express an opinion in these cases. I concur in the conclusion.

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LUDELING, C. J., *dissenting*. The record exhibits the following facts:

In November, 1856, the defendant Pipes sold to Tait & Cleveland a tract of land in the parish of Morehouse, and retained the vendor's privilege and a special mortgage thereon to secure the payment of the price. The act of mortgage does not contain the pact *de non alienando*. On the twenty-sixth of July, 1858, Tait & Cleveland made a partition between themselves of this tract of land. In March, 1864, Tait sold his portion of the land to B. W. and D. M. Burnham, who assumed to pay the mortgage debt due to Pipes as a part of the price of the sale to them. They sold to Haddick, who also assumed the payment of the mortgage debt due to Pipes; and Haddick sold to Taylor, the plaintiff in this suit, who expressly declares in the act of sale that he buys the land subject to the mortgage of Pipes, and without warranty, except against the claims of the vendor and his heirs.

Pipes sued out executory process to sell the land mortgaged to him, and afterwards changed the executory to the ordinary proceeding to

foreclose his mortgage. The records of this suit having been destroyed by fire, the facts in relation to that suit are not as accurately shown by this transcript as might have otherwise been proper. It does not appear from the record when this suit to foreclose the mortgage was originally filed. It is stated by the defendant to have been filed in March, 1866, and this is not expressly denied by the plaintiff.

It appears that Tait, individually and as administrator of Cleveland (who had died) and W. A. Haddick, who had purchased from Burnham as aforesaid, and who was in possession of the property, were cited to defend the suit. And subsequently Pipes filed a supplemental petition, in which it is alleged that since the institution of the proceedings against Tait, individually and as administrator of the estate of Cleveland and W. A. Haddick and *during the pendency of said suit*, Haddick had sold the property to J. C. F. Taylor, and he asked that copies of the original and amended petitions in the suit against Tait and Haddick, together with the supplemental petition, might be served upon Taylor, and for judgment commanding him to pay the debt or to give up the land to be sold under the mortgage. It appears that a judgment by default in this suit was subsequently made final in favor of the plaintiff Pipes against Tait individually and as administrator of the estate of Cleveland for the amount of his claim, and making the mortgage executory and ordering the property described in the mortgage to be sold to satisfy the debt. It does not appear whether there was any other action in this case as to either Haddick or Taylor. This judgment was announced on seventeenth June, 1867, but was not signed until tenth December, 1868. In September, 1869, execution was issued under this judgment, the mortgaged property was seized and advertised for sale, and the plaintiff in the present suit (Taylor) enjoined the writ on the following grounds: That the judgment under which the seizure was made was against W. C. Tait individually and as administrator; that there was no judgment against him (Taylor), and as to him the suit was still pending. That the act of mortgage did not contain the pact *de non alienando*, and the land could not be seized in petitioner's possession under a judgment against the original mortgager. That the proceedings against himself and Tait had not been preceded by the demand and notices required by law before an hypothecary action could be instituted. That no notice of judgment had been served on the judgment debtor before the issuing of execution. That the mortgage was extinguished by virtue of a probate sale made of a portion of the land embraced in the mortgage. And, finally, it was urged that the claims upon which the judgment is based were prescribed.

The plaintiff also enjoined the sheriff from leasing the land seized, on the grounds above stated, and subsequently filed an amended

petition claiming the amount of rents already collected by the sheriff. These suits were consolidated and tried together. There was judgment in favor of the plaintiff perpetuating the injunctions and condemning the sheriff and Pipes *in solido* to pay \$1760, the amount of rents collected and costs, and the defendant Pipes has appealed.

The principal question for decision in this cause is whether Taylor, who purchased during the pendency of the suit to foreclose the mortgage against his vendor, is entitled to the notice required by law in the hypothecary action proper?

It has already been stated that Haddick, who was in possession when these proceedings were commenced, had assumed the payment of the mortgage debt; and he and the original debtors were sued *in solido*. During the pendency of this suit, to wit, on the seventeenth August, 1866, Taylor acquired the property in question, subject to the mortgage and without warranty, for \$3000—a sum much less than the real value of the property, as shown by the evidence.

It is clear that, as to Haddick, the demand and notice prescribed by article 69 of the Code of Practice were not necessary, as he had assumed the debt and was personally bound for it. C. C., art. 3403; 15 La. 184, Woodward v. Dashiell; 6 R. 407, Twichel v. Andry; 1 R. 135, Duncan v. Elam.

Could Haddick practically defeat the object of that suit by transferring the mortgage property to another, pending the action to enforce it? I think not. It is contended that there is no proof that Taylor knew of the pendency of the suit. Perhaps there is no direct evidence of this fact; but the facts established satisfy us that Taylor had actual knowledge of the pendency of the suit; but whether he had or not, "it is a rule of universal jurisprudence and one which has been expressly recognized in our Code, that every man is presumed to be attentive to what passes in the courts of justice of the State where he resides or has transactions. A purchaser, therefore, of an estate actually in litigation, *pendente lite*, even for a valuable consideration, and without any express or implied notice in fact, affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the decree in the suit. The rule may sometimes operate harshly, but it is founded upon grave considerations of public policy, and must therefore be respected and enforced. 3 An. 252, Gillispie v. Cammack; Story's Equity, vol. 1, p. 394; C. C. 2428; 13 La. 257; 4 La. 557, Cable v. Davenport; 1 John. Ch. R. 576. In 11 Vesey, Jr., 194, Sir William Grant said: "Ordinarily, it is true, the decree of the court binds only the parties to the suit. But he who purchases during the pendency of the suit is bound by the decree that may be made against the person from whom he derives title; the litigating parties are exempted from the necessity of taking any notice of a title so acquired. As to them

it is as if no such title existed. Otherwise suits would be indeterminate, or, which would be the same in effect, it would be in the pleasure of one party at what period the suit would be determined. The rule may sometimes operate with hardship upon those who purchase without actual notice, yet general convenience requires its adoption." In the case of *Cable v. Davenport*, 4 La. 558 (Judge Martin being the organ of the court), it was held that where mortgaged property is sold and transferred by the third possessor, on the day of the service of the citation, at the suit of the mortgagee to enforce the mortgage against said third possessor, such transfer and disposition will not affect the rights of the mortgagee.

The plaintiff's counsel have referred to *Maskell v. Merriman*, 9 R. 70; *Williams v. Morancy*, 3 An. 228; *Brown v. Routh*, 4 An. 270; *Waddill v. Payne & Harrison*, 22 An. 135, and *Barrelli v. Delassus*, 16 An. 223, in support of a contrary doctrine, that is, to support the position that one who buys during the pendency of a suit is not affected by that suit, but must be proceeded against *de novo* by the hypothecary action proper. I do not think the authorities cited in point. In *Maskell v. Merriman*, at the time of the sale a judgment had some time previously been obtained on the mortgage note. In *Williams v. Morancy*, *Williams* and *McMurtry* executed a mortgage in favor of *Morancy*. Upon this mortgage *Morancy* obtained an order of seizure and sale, but desisted from executing it at the instance of *Williams*, who paid the greater part of the debt. *Mrs. Chaille* purchased the mortgaged property and assumed to pay the debt to *Morancy*. After her death her administrator paid the balance remaining due by draft upon *Britton & Co.*, of which firm *Koonts* was a member, and at the request of the administrator *Morancy* transferred the note to *Koonts*, and subrogated the latter, as is alleged, to the rights under the judgment in executory proceeding. The attorney of *Koonts* then had an execution on the order of seizure and sale obtained by *Morancy*, and in the name of *Morancy* for the whole debt, and *Williams*, the original debtor, enjoined the sale.

It is manifest that in these two cases there was no suit pending in relation to the property mortgaged at the date of the sale. In the case of *Maskell v. Merriman*, chiefly relied upon, the court said: "In point of fact the mortgage had already been transferred to *H. R. Lee & Co.*, and they had recovered judgment upon it against *Kemper*, the vendor, and other parties to it; but the record does not show that *Merriman* had any notice or knowledge that such a judgment had been rendered. \* \* The question then is whether *Merriman* was entitled to the rights and privileges of a third possessor, to the notice required by the Code to third possessors in ordinary cases, or whether the mere fact that a judgment had been rendered against the mortgager,

although no execution was issued until the fifteenth of November, 1842, more than ten months after the defendant took possession, can deprive him of such privilege." It is manifest that the essential difference between that case and the one at bar is that in the Merriman case he did not buy *pendente lite*, while in this case Taylor did. In the former case the sale did not in any manner interfere with the rights of the plaintiffs, whereas in the present case the effect of the sale to Taylor would be to defeat the suit, and that notwithstanding it was regularly commenced and conducted. In the cases of Brown and Harrison and Waddill v. Payne & Harrison, the court simply announced the general rule that mortgaged property can not be seized in the hands of a third possessor, unless the mortgage contain the pact *de non alienando*, without first giving him the notice required by article 69 of the Code of Practice. The question to be decided here was not made or passed upon in those cases.

In the case of Barrelli v. Delassus, the latter attempted to enforce a judgment obtained against J. A. Pellerin, in a suit for a settlement of partnership between them, by seizing property in the possession of Barrelli. This property, consisting of real estate, had been purchased in Pellerin's name, but by a verbal agreement it was to enure to the benefit of Delassus also. A verbal partnership existed between Pellerin and Delassus, and by a verbal agreement the property was to remain in Pellerin's name, and he was to allow Delassus the sum disbursed for the purchase, and render an account of the partnership.

During the pendency of the suit for a settlement of the partnership Pellerin executed a mortgage on the property in favor of Barrelli, who foreclosed the mortgage and bought the property. Delassus obtained judgment against Pellerin with privilege upon the property bought by Pellerin, and subsequently purchased by Barrelli, and under that judgment he seized the property in Barrelli's hands. There was judgment recognizing this seizure, but subsequently, on rehearing, the court said: "Upon a careful review of article 2423 of the Civil Code we have come to the conclusion that the doctrine of our former opinion is too broadly laid down."

It is evident that the facts in that case could not have presented the question raised in the case at bar. And to my mind it is equally evident that the question to be decided in this case is not decided in any of the cases cited in support of the position assumed by the plaintiff. If Taylor be entitled to the notice as a third possessor, his vendee, in case he should sell *pendente lite*, would also be entitled to the same notice, and the plaintiff would discover that he had a legal right without a practical or real remedy; which is an absurdity.

I do not believe that our laws relative to mortgages are so defective.

"The thing claimed as the property of the claimant can not be

alienated pending the action so as to prejudice his right." C. C. 2433.

The principle here announced has heretofore been applied, by analogy, at least, to one seeking to enforce his mortgage rights, by this court, and I see no good reason for overruling the decisions, but, on the contrary, I think the principle consonant with equity, reason and universal jurisprudence. 4 La. 557; 13 La. 257; 3 An. 252; 11 Vesey, Jr., 194.

Taylor ought not therefore to be treated as a third possessor.

But it is said that the right of the mortgagee is not affected or impaired by requiring him to pursue anew each successive purchaser of the property during the pendency of the suit, because the mortgagee would get a personal judgment against each one of them if they failed to deliver up the property. I do not agree in this opinion. No personal judgment against a third possessor is authorized by law. The privilege is accorded to him to pay the debt, if he prefer to do so, rather than to deliver up the property. But were it otherwise the mortgagee's real right, the right to sell the property mortgaged to satisfy his debt, would still be practically destroyed.

This suit was commenced in March, 1866. On the sixth of August, 1867, a supplemental petition was filed in the suit, which was served upon Taylor with citation, and which substantially notified him of the judicial proceedings and demands against the mortgaged debtors, and judgment was prayed for recognizing the mortgage and privilege and for the sale of the land, unless Taylor should pay the debt due.

Long after the service of this supplemental petition a judgment was rendered in the suit against the original debtors for the debt, and recognizing the mortgage and vendor's privilege and ordering the property to be sold to satisfy the mortgage debt. The destruction by fire of the records and the manner in which this case has been presented to us does not enable us to say with certainty whether the case as to Taylor is still pending or not, but we can conceive of no reason why it should be pending, or how the judge *a quo* could have ordered the sale of the property in the hands of Taylor unless he had passed upon the whole case. And no appeal seems to have been taken from said judgment.

Whether notice of judgment to the original debtors was served or not does not concern Taylor; it is a defense personal to the debtors, which they have not seen fit to urge. As to the position that the mortgage is extinguished because a part of the property (that received in the partition by Cleveland) was sold at probate sale, it is sufficient to say that in the case of Cleveland v. Pipes, where this question is made, we have held that there was no probate sale.

The plaintiff's counsel urge in their brief that the mortgage has no existence as to them, because there is no proof in the record that it

was ever recorded in Morehouse, and they urge that the judge *a quo* erred in permitting a copy of the act of mortgage with the certificate of recordation in the parish of Morehouse to be filed after the case had been tried. From the bill of exceptions it appears that the attorney for defendant, representing that he had been under the impression that the copy of the act of mortgage offered in evidence by the plaintiff's counsel had the certificate of recordation in the parish of Morehouse, and that he was taken by surprise, the judge permitted him to offer it in evidence. The case was tried by the judge; it is evident he had a right to grant a new trial to receive the evidence, and it is equally evident that the plaintiff's attorneys were not taken by surprise by the evidence, and that no injury or injustice could be done by receiving the act. Under these circumstances it would be carrying technicalities too far to reject the evidence. But applying a less technical rule to the plaintiff, there would be no necessity for the evidence; he has not alleged in his petition for injunction that the mortgage was not registered; it does not form one of the grounds for injunction sworn to, and therefore he can not urge it here.

There remains only one other question for decision, whether or not the claims secured by the mortgage were prescribed when the judgment was rendered against Tait, or before? Article 3466 of the Civil Code declares, that "creditors and all other persons who may have an interest in the acquiring of an estate, or the extinguishment of an obligation by prescription, shall have a right to plead it, even in case the person claiming such estate or bound by such obligation should renounce such right of prescription." On their face the notes are prescribed, unless there has been an interruption of the course of prescription.

On the trial the defendant offered an act under private signature to prove an interruption of prescription, which was objected to on the ground that the date of the act was not proven and, as to plaintiff, it had no date. The objection was overruled and the evidence was received. We think the ruling was erroneous. Where the real date of an act *sous seing privé* is not proved *aliunde*, it will date as to third persons only from the day of its production in court. 11 An. 275; 11 R. 56; 7 R. 53.

In a private act, whereby the land bought from Pipes was partitioned between the vendees (Tait and Cleveland), they acknowledge the debt of Pipes, and Tait obligates himself to Cleveland to pay a greater proportion of the debt in consideration of receiving the more valuable portion of the property divided. This act bears date twenty-sixth of July, 1858, but was only recorded on the fifteenth of December, 1859. The latter is the date of the act as to third persons. On the second day of March, 1864, Tait sold the land to B. W. and D. M. Burnham,

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by act under private signature, which was recorded in the recorder's office on the sixth of March, 1864. In that act the debt to Pipes is acknowledged and the purchasers assume to pay it as part of the price of their purchase. Suit was instituted on these notes in March, 1866, and judgment was pronounced in 1867, but signed in 1868, *nunc pro tunc*.

It is clear, therefore, that the evidence in the record (without document K, which should have been excluded) shows that before prescription had accrued its course was interrupted by the repeated acknowledgments of the debt by the debtors.

I dissent therefore from the views of a majority of my associates in this case.

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TALIAFERRO, J. I concur in the dissenting opinion of the Chief Justice.

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NO. 342.—J. S. COPES v. PHELPS & CO.

Commission merchants in the city of New Orleans who receive cotton as agents and fail to obey or follow the instructions of the shipper incur a liability to the owner for its value.

**A**PPEAL from the Tenth Judicial District Court, parish of Caddo. *Henry G. Hall*, attorney at law, Judge *ad hoc*, vice *Levissee*, J., recused. *Williamson* and *Levissee*, for plaintiff and appellee. *Nutt & Leonard*, for defendants and appellants.

TALIAFERRO, J. The defendants, who keep at Shreveport a warehouse for the reception of merchandise for storage and shipment, received in their business character as warehousemen ten bales of cotton, forwarded to them from Nacogdoches, Texas, by one Hosea, who, by letter, instructed them that he had ordered a lot of twenty-four bales to be sent to them for shipment to the plaintiff in New Orleans, and directed them if the entire lot of cotton should not be received together, to wait until the whole was received and ship it all together. This letter bears date March 18, 1866. Under date of April 14, same year, Phelps & Co. received a letter from Voight & Co., of Nacogdoches, informing them that Voight & Co. had forwarded to them for account of C. E. Hosea ten bales of cotton, part of a lot of twenty-four bales, the other fourteen to be forwarded as soon as practicable. Bills of lading for the ten bales were inclosed in the letter. The ten bales of cotton, marked with the plaintiff's initials, were received on the twenty-third of April. It is in evidence that the next day after the ten bales were received, Hosea in person called at the warehouse of Phelps & Co. and informed them he had changed his mind in regard to shipping the cotton, having concluded to sell it at



Shreveport; that accordingly Hosea gave to Rapley & Co. an order for the cotton; and it was delivered to them.

On the thirteenth of April Copes wrote to Phelps & Co. informing them that he had written to them on the twenty-fourth of March, acquainting them that they would receive twenty-four bales of cotton marked J. S. C., and forwarded for shipment to him, and that Hosea had written to them to forward the cotton without delay. In reply to this letter of Copes, Phelps & Co. wrote as follows:

"SHREVEPORT, April 24, 1866.

"Dr. J. S. Copes, New Orleans:

"*Dear Sir*—Your favor of the thirteenth, and Mr. C. E. Hosea's of the eighteenth, relative to twenty-four bales of cotton (J. S. C.) are before us. We yesterday received through Messrs. Voight & Co. ten bales of the cotton, accompanied by Mr. Hosea's letter to us of the eighteenth ultimo, and a note from Messrs. Voight & Co., stating the remaining fourteen bales would be forwarded as soon as possible. In accordance with Mr. Hosea's instructions we will hold the ten bales until the balance arrives.

"Truly yours,

PHELPS & CO."

There is in evidence a letter of the eighteenth of April from Hosea, dated at New Orleans, and addressed to Phelps & Co., in which he informs them that no information had been received of the arrival at Shreveport of the cotton purchased by him for Dr. Copes. He requested them, if the cotton had not come to hand, to write to Nacogdoches, making inquiries in relation to it, and as soon as it was received to ship it to Dr. Copes. The plaintiff in this action sues Phelps & Co. for the ten bales of cotton, alleging that he has never received the cotton or any part of it. The answer is a general denial, and the defense is that defendants dealt with Hosea and are not bound in any manner to the plaintiff.

Judgment was in favor of the plaintiff. Defendants have appealed.

The plaintiff himself testifies that he was informed in New Orleans by J. E. Phelps, one of the firm of Phelps & Co., that they had received on his account ten bales of cotton, but they had turned it over to one Hosea, who represented himself to be Copes's agent. This statement is contradicted by Phelps, one of the defendants, in his testimony.

Phelps & Co. received the ten bales of cotton with the knowledge that they were to be shipped to the plaintiff. Before Hosea gave the order for the delivery of the cotton to Rapley & Co., Phelps & Co. received the plaintiff's letter confirming the statement of Hosea, that the cotton was to go to the plaintiff, and they received also by that letter the plaintiff's instructions to ship the cotton to him by the first boat. The plaintiff spoke of the lot of twenty-four bales of his cotton to be sent to the defendants at Shreveport on his account, and directed

them to ship the cotton to him without delay. The defendants, by the tenor of their letter, in reply to these instructions, implicitly recognized the plaintiff's right to control the cotton. They inform him that ten bales of the lot had been received, and that the remaining fourteen would be forwarded to them as soon as possible. They expected to receive the remainder soon, and deemed it proper before shipping to await its arrival and ship the whole together, as instructed by Hosea. The instructions of Hosea were that the cotton was for the plaintiff. The defendants in no instance questioned the plaintiff's right to control the cotton, and under the status of the parties at the time Hosea gave the order to Rapley & Co. it was at least the part of prudent men, before delivering the cotton to the latter, to have required from Hosea an explanation of his order countermanding the shipment to the plaintiff. Phelps & Co. had become the agents of the plaintiff, and by failing to obey their instructions incurred responsibility to the plaintiff.

Judgment affirmed.

Rehearing refused.

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NO. 360.—J. J. LONG v. L. TEMPLEMAN, Curator.

Where the principal and the surety on a promissory note reside in another State at the time of the making of the note, and the principal afterward removes to Louisiana, and the surety is compelled to pay the note where it was made, the surety can recover from the principal obligor in this State the amount which he has paid.

**A**PPEAL from the Tenth Judicial District Court, parish of Caddo. *Levisse, J. Egan, Williamson & Wise*, for plaintiff and appellant. *Nutt & Leonard*, for defendant and appellee.

HOWELL, J. The plaintiff alleges that the succession of J. R. J. Daniel is indebted to him in the sum of five thousand dollars, with six per cent. interest, from January 1, 1860, in this, that on the eighteenth of March, 1856, the said Daniel executed his promissory note in North Carolina for said sum with plaintiff and three others as sureties, on which the said Daniel paid the interest to the first of January, 1860, and which he was compelled to pay. The defense is a general denial and the plea of prescription.

It is in evidence that when plaintiff paid the note it was not prescribed by the laws of North Carolina, where it was executed. If it was not prescribed by the laws of that State, neither the plaintiff, as surety, nor the principal Daniel could interpose the prescription of the laws of Louisiana against the liability to pay in North Carolina, and prescription not having accrued since the surety paid, the plea is not well made.

The case of *Gates v. Renfree*, 7 An. 169, relied on by defendant

decides, so far as applicable to this case, that the surety who had paid without being sued, and without giving the principal notice, when the principal was not, by the laws of the State where the surety resided and the contract was made, bound to pay, could not recover from the latter in this State. In this case the principal obligor was bound by the laws of the State where the contract was made and the surety resided to pay, and hence the surety who paid there can recover of the principal obligor here. But he can recover only what he has paid, which is shown to be only four thousand dollars, with six per cent. interest, as allowed by the laws of North Carolina, from the date of payment, twentieth of March, 1869. We regard plaintiff's action as one simply to recover what he paid as surety, and not as the holder and owner of a negotiable note.

It is therefore ordered that the judgment appealed from be reversed, and that plaintiff be recognized as a creditor of the succession of J. R. J. Daniel, represented by L. Templeman, curator, in the sum of four thousand dollars, with six per cent. interest from January 1, 1869, to be paid in due course of administration. Costs of both courts to be paid by said succession.

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NO. 361.—MRS. H. HARRISON v. SUCCESSION OF JOHN ADGER.

The act of Congress of June 11, 1864, suspending the prescription of actions in the insurrectionary States has no retrospective effect, and only suspends the prescription of such actions from the date of its passage during the time the defendant was beyond the reach of legal process. In this case it is shown that legal process could have been had against the defendant from and after the month of August, 1865.

Held—That the plaintiff could, under this law of Congress, only claim a suspension of prescription from the eleventh day of June, 1864, until the month of August, 1865, which time, when deducted from the time which intervened from the maturity of the obligation to the bringing of the suit, was sufficient to defeat the plea of prescription.

**A**PPEAL from the Eighteenth Judicial District Court, parish of Bossier. *Watkins, J. Egan, Williamson & Wise*, for plaintiff and appellant. *Griffin & Snider*, for defendants.

HOWELL, J. This is a suit on three promissory notes and a sum of money alleged to have been collected by the deceased as agent of plaintiff and not accounted for. The defense is a general denial, and the plea of prescription of five and ten years.

The notes on their face are prescribed, but plaintiff's counsel contend that "the time during which the war continued must be deducted from the estimate," and invoke the act of Congress of June 11, 1864, relative to the limitation of actions (13 Stat. at Large, 123), *Stewart v. Kahn*, 11 Wal. 493 and *Auchincloss v. Frois*, 24 An. 31, to support their position.

Upon the application of this act of Congress we must say that, under its language it can not have retroactive effect, and provides only that

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the time, during which the person sued shall be beyond the reach of legal process by the operations of the war, shall not be deemed or taken as any part of the time limited by law for the commencement of the action. This law went into operation on the eleventh of June, 1864, and the courts in Bossier parish were accessible to plaintiff as early as July or August, 1865, showing a suspension of only thirteen or fourteen months, not sufficient to prevent the prescription of either of the notes herein. In the case of *Stewart v. Kahn* the United States Supreme Court held that the act of Congress was simply the recognition of the maxim, *contra non valentem*. This court has held that this maxim has no place in our laws on prescription, and as the act of Congress has no retroactive effect, we can under our jurisprudence give it force only from its date, and apply its benefits for the time during which no legal process could reach the debtor after that date.

The claim for money collected is prescriptible in ten years, and the time not having expired when this suit was instituted prescription is not acquired. The defense as to Confederate money, urged in the brief, is not sustained by the evidence.

It is therefore ordered that the judgment appealed from sustaining the prescription of the demand in the petition of reconvention be reversed, and that plaintiff recover of the succession of John Adger the sum of four thousand nine hundred and forty-six dollars and forty-one cents, with legal interest, from the twenty-eighth of October, 1862, and costs in both courts, to be paid in due course of administration.

Rehearing refused.

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NO. 309.—G. W. C. TREZEVANT v. J. D. HOLLY.

In an hypothecary action to enforce a minor's mortgage against a third possessor, the exception that the tutor abandoned his trust and left the country, thereby rendering it impossible to make demand upon him or settlement with him, is not a good defense in bar to its prosecution.

**A**PPEAL from the Fourteenth Judicial District Court, parish of Richland. *Ray, J. Wells & Williams*, for plaintiff. *Todd, Brigham & Potts*, for defendant.

HOWE, J. This is an hypothecary action to enforce a minor's mortgage against certain lands in the hands of a third possessor. Two exceptions were filed—*first*, that there is no allegation in the petition that a demand for the payment of the debt has been made of the principal debtor thirty days prior to the institution of the suit, or that notice of such demand has been given to the defendant according to law; and *second*, that the petition does not show any settlement of the tutorship, any account rendered, or any proceedings instituted to procure the rendition of an account.

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Tresevant v. Holly.

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It appears by the allegations of the petition and the evidence taken on the trial of the exceptions that John Clark, the tutor, long prior to the commencement of this action, abandoned his trust and went to reside permanently in Canada, leaving no property in this State. In view of these facts, rendering a demand on him or a settlement with him impossible, we think both exceptions were properly overruled.

The cases of *Brown v. Sadler*, 13 An. 205, and *Cummings v. Erwin*, 15 An. 289, though not precisely similar, throw some light on this question.

Upon a review of the whole case on the merits, however, we have concluded that the interests of justice would be best subserved by remanding the cause for a new trial. The claim of a plaintiff against a third possessor in such a case and for such a reason ought to be made very certain. It is very uncertain as made out by this record.

It is therefore ordered that the judgment appealed from be set aside, and the cause remanded for a new trial, appellee to pay costs of appeal.

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No. 358.—*AMOS ABRAMS v. A. G. TEAGUE.*

An attachment will lie against a debtor who is about to sell or dispose of his property to defraud his creditor.

**A**PPEAL from the Eighteenth Judicial District Court, parish of Bossier. *Watkins, J. J. D. Watkins*, for plaintiff. *Griffin & Snider*, for defendant.

**LUDELING, C. J.** This is a suit for an amount of cotton loaned, or its value, and for moneys loaned and supplies furnished to the defendant. The suit was commenced by personal citation and an attachment based on the allegation that the defendant was about to dispose of his property to defraud the plaintiff.

The answer contained a general denial—an averment that this suit was for a settlement of a partnership, and that the plaintiff is indebted to him for damages caused by the injury done his crop by plaintiff's cattle, hogs, etc., and also for board during six months. He avers that the attachment was wrongfully sued out.

The evidence satisfies us that the plaintiff's demands are just, except in one particular, which should be reduced four dollars and a half; and it further shows that the defendant was about to sell his property to defraud the plaintiff. These facts appear from an agreed statement of facts filed in the case.

It is therefore ordered and adjudged that the judgment of the lower court be annulled, and that there be judgment in favor of plaintiff and against the defendant for the sum of six hundred and fourteen dollars and eleven cents, with five per cent. per annum interest from

judicial demand, and for the delivery of three thousand three hundred and fifty-three pounds of lint (cotton) baled; or in default thereof, for five hundred and seventy dollars and thirty-five cents, with five per cent. per annum interest thereon from the first of January, 1872.

It is further ordered that the attachment be maintained; that the privilege resulting therefrom be recognized and enforced against the property seized; that the reconventional demands be dismissed, as in case of non-suit, and that the defendant pay costs of both courts.

NO. 343.—HOSS AND DURHAM v. E. D. WILLIAMS.

An attachment which has been granted on the allegation that the defendant was about to remove his property out of the jurisdiction of the court without paying his debt will be set aside if the evidence fails to show such intention, and the attaching creditor will be condemned to pay the damages caused by its wrongful issue.

Privileges spring from the law and not from contract.

**A**PPEAL from the Tenth Judicial District Court, parish of Caddo. *Levisse, J. John M. Lawton*, for plaintiffs and appellants. *O. M. Pegues*, for defendant and appellee.

HOWELL, J. This is a suit on an open account for \$699 20, accompanied with an attachment based on the additional grounds authorized by the act of 1868, under which thirty bales of cotton were seized. After the property was bonded by the defendant the plaintiffs filed an amended petition alleging that they had a privilege as furnishers of supplies upon the crop raised on the plantation of defendant in 1870, and obtained a writ of sequestration, under which twenty bales were seized and afterwards bonded. Motions were made to dissolve both writs, on grounds substantially that no cause existed for their issuance. These motions were by consent referred to the trial on the merits. The answer contains a general denial and the allegations that the plantation belonged to defendant's mother, and was cultivated by different parties on separate leases, and that only four bales of the cotton seized belonged to defendant. Judgment was rendered for the amount claimed, sustaining the attachment, granting a privilege on the cotton attached and condemning plaintiffs to pay the costs of the sequestration. The defendant appealed.

On the trial the defendant offered the testimony of several witnesses to prove how much cotton was raised on his mother's plantation in 1870; how much of it had been sold before the institution of this suit; by whom sold and for what purpose; who made and owned what was so sold; and that all of the cotton attached, except four bales, belonged to other persons; to show the good faith of defendant, which was excluded on the ground that defendant was without interest, to show that the property attached belonged to other persons, and such defense is not allowable.

The testimony (which comes up with the record) was clearly admissible on the issues presented by the motion to dissolve the attachment, which were referred to and tried with the merits. By it the defendant proposed to prove that there was no legal ground for the attachment, as he was acting in good faith and not with the intention of defrauding plaintiffs or placing his property beyond their reach. And we think it abundantly establishes such facts and shows a want of legal ground for the attachment.

Upon the merits the correctness of the account is not disputed, but it is denied that there is any privilege on the crop of 1870 for the first item, \$269 20, which is a balance from the account of the preceding year. This is correct. Privileges can not be given by consent. The privilege as to the remainder of the account sued on must be enforced upon the cotton sequestered, as there is no evidence to identify and separate that belonging to other parties.

The claim for damages for the illegal attachment should be allowed, which, under the circumstances, we fix at fifty dollars for counsel fees.

It is therefore ordered that the judgment appealed from be reversed, and that the attachment issued herein be dissolved at plaintiffs' costs, and that defendant recover of them fifty dollars damages. It is further ordered that plaintiffs recover of defendant \$699 20, with legal interest from March 4, 1871, and the privilege of furnishers of supplies on the property sequestered for the sum of \$430 only of said amount, and all other costs in the lower court. Plaintiffs and appellees to pay costs of appeal.

NO. 313.—E. W. WARFIELD et al. v. F. P. STUBBS et al.

Personal property that has been seized under a sequestration and released from seizure on a bond given by the defendant reverts back to his possession, and he may dispose of it at his pleasure without consulting the seizing creditor.

In such a case the securities on the bond can not escape liability on the ground that the defendant has been required to remove the property sequestered from the premises leased.

**A** PPEAL from the Fourteenth Judicial District Court, parish of Onachita. *Ray, J. W. J. Q. Baker*, for plaintiffs. *Stubbs & Cobb*, for defendants and appellants.

LUDELING, C. J. This suit is to enforce the obligation contracted by the defendants, sureties on a bond, given to release movable property seized under a writ of sequestration.

The defense is that the sureties are discharged from all liability on the bond, because Oliver was required by the lessors to remove from premises leased the movables sequestered, as thereby they lost their privilege and right of pledge on the property, and they could not subrogate the defendants to all their rights, privileges and liens unimpaired as they existed at the time defendants signed the bond.

There is no merit in the defense. It is well settled that after the sequestration had been set aside by executing the delivery bond, Oliver had the right to dispose of the movables without the consent of the plaintiffs, and that the latter had no power to prevent the former from removing the property from the plantation leased. The bond was substituted for the property.

The obligation of the sureties in this case was that they would be responsible that the defendant Oliver would not send the movables seized out of the jurisdiction of the court; that he would not make an improper use of them, and that he would faithfully present them after definitive judgment in case he should be decreed to restore them to the plaintiffs. C. P. 279. The judgment of the court having been against Oliver, and the principal and sureties to the delivery bond having failed to restore the property bonded to the plaintiffs, the sureties have incurred the penalty of the bond.

But the evidence in this record shows that the sureties were aiding and assisting their principal Oliver in all the transactions between Oliver and the plaintiffs, of which said sureties now complain, and that a large portion of the movables were placed in the possession of Stubbs & Cobb and B. M. Horrell & Co. Therefore neither equity nor law will support the defense set up. The case of *Charles Clapp v. Henry Seibrecht*, cited by defendants, instead of supporting their position is directly against it. 11 An. 528. The other authorities cited are not in point. In the case of *Harrison v. Jenks et als.*, 23 An. 707, the question decided was that the privilege of the lessor was not destroyed by the release of the provisional seizure by bonding, and that if the property remained on the premises leased, the privilege might be still asserted against it. It was not, however, decided that notwithstanding the defendant had bonded the property he could not remove it from the premises leased. To hold this would be practically to repeal article 279, Code of Practice.

The only question to be examined as between Stubbs & Cobb and B. M. Horrell & Co. is whether or not the latter are entitled to a credit on the judgment in favor of Stubbs & Cobb over against them for the proceeds of forty-five or forty-six bales of cotton received from Oliver and accounted for to him. It is contended that whatever Stubbs & Cobb received as sureties for Oliver they must account for to B. M. Horrell & Co., their guarantors. If Stubbs & Cobb received this cotton as security to indemnify themselves against loss on account of their obligation as Oliver's security, the position is, no doubt, correct. But the evidence does not, in our opinion, establish that fact. It appears that after the release of the property from the seizure under the sequestration, and after the seizure of the property under a *feri facias* issued under a judgment in favor of B. M. Horrell & Co., Oliver



delivered to them the cotton aforesaid for shipment. They accounted to him for the proceeds thereof, thus: They retained the amounts due them by Oliver for fees in several suits and for bagging, etc., furnished for the cotton, and paid him seven hundred dollars in money. If Oliver could dispose of the property after the release, we can imagine no good reason why he could not pay his attorneys as well as B. M. Horrell & Co. themselves, as they did out of the proceeds of the cotton.

The plaintiffs and appellees have prayed for damages for a frivolous appeal. We think they are entitled to them.

It is therefore ordered and adjudged that the judgment appealed from be affirmed, with costs and ten per cent. damages for a frivolous appeal.

Rehearing refused.

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No. 316.—L. M. B. RIND et al. v. JAY L. HUNSICKER et al.

An attorney at law who has instituted a suit which is afterward compromised before judgment, can not be permitted to prosecute the suit to judgment for the purpose of enforcing a privilege upon it for his professional services in the case.

**A**PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. W. J. Q. Baker*, for plaintiffs and appellants. *Morrison & Farmer*, for defendants and appellees.

HOWELL, J. The plaintiffs having obtained a judgment in their favor, in the suit of the Citizens' Bank v. Fluker et al., for the sum of \$3500 in the hands of the sheriff of Ouachita parish, and failed to get it before the death of the said sheriff, instituted this suit against the sureties on his official bond for the said amount, and twenty per cent. damages. Exceptions and answers were filed, and pending the suit the claim was compromised between the parties, the agent of plaintiffs stipulating to dismiss the suit. On application for this purpose an order of dismissal as to plaintiffs and defendants was granted but not then signed. At the same time W. J. Q. Baker, Esq., filed a petition in this suit alleging that he had been and then was the attorney at law who had conducted all the proceedings for plaintiffs in relation to the matter; that they are non-residents and have no property in this State except the said money; that his professional services in the matter are worth \$1500; that by law he has a special first privilege for the same "on the judgment he may obtain in this case;" that no judgment has yet been rendered herein, and the plaintiffs have no right to sell the claim or do any act tending to defeat his privilege without paying him; and the attempt to sell their claim to the defendants was a fraud on his rights and an illegal attempt to deprive him of his privilege and his fees and the costs paid by him, all of which are secured by a

24 571  
112 992

privilege on the only movable property plaintiffs possess in this State. He prays for leave to file this motion :

"That this case proceed to judgment, and that in the judgment the court decree that petitioner has a first privilege on said judgment for the amount of his professional fees (\$1500), to be paid by preference, and that the act of compromise and sale and subrogation, or other act entered into between the plaintiffs and defendants, be declared as to petitioner fraudulent, simulated, collusive and void, and that the costs of the clerk and sheriff paid and due be taxed and ordered to be paid as part of the judgment before the said assignees be permitted to take anything."

In making the order of dismissal first above referred to, the court reserved to said Baker his right to introduce testimony on his said rule for fees. Bills of exceptions were taken by him to the order of dismissal, and by defendants to the filing of the said motion or petition, and the order to show cause thereon, and they excepted to the form of proceeding.

We regard the proceeding as novel and irregular; but viewing it as an intervention, the nature and object of which are determined by the prayer, we deem it the better course to decide on the right to make or obtain the demand. We know of no law giving an attorney at law a privilege on a judgment not yet in existence, and no law to compel a party to prosecute a suit to a judgment in order that the attorney in the suit may obtain and enforce a privilege on the said judgment for his professional services. The plaintiffs having compromised their suit against the defendants, which they had a right to do, and demanded its dismissal, it was at an end, and there is no suit in which an intervention can be maintained.

Judgment affirmed.

#### ON APPLICATION FOR REHEARING.

The court did not decide, as intimated by the applicant, that Baker had not a privilege on the payment obtained by him in favor of Rind in the suit of *Citizens' Bank v. Fluker et al.* We decided only on the issues presented in the rule of Baker in this case.

Rehearing refused.

# CASES

## ARGUED AND DETERMINED

### IN THE

# SUPREME COURT OF LOUISIANA,

### AT

## NEW ORLEANS.

NOVEMBER, 1872.

### JUDGES OF THE COURT:

HON. JOHN T. LUDELING, *Chief Justice.*

HON. J. G. TALIAFERRO,

HON. R. K. HOWELL,

HON. W. G. WYLY,

HON. W. W. HOWE,

*Associate Justices.*

No. 2255.—SUCCESSION OF CABALLERO (MRS. CONTE) *v.* THE EXECUTOR et al.

24	573
46	886
24	573
115	706

A marriage contracted in Spain between parties who had formerly lived together in a state of concubinage in Louisiana, but who removed to Spain to reside there permanently, had the effect of legitimizing the children born in Louisiana before the removal, and a will made by a man in this situation before the marriage, who after the marriage in Spain again moves to Louisiana with his wife and children thus legitimated to live, and he and his wife both die here, the legacies must be reduced to the disposable portion of the testator, because the marriage legitimizes the children, who become forced heirs, which revokes the will and limits its dispositions to the disposable portion, the same as if the children had been born in lawful wedlock posterior to its date.

24	573
119	713

The fact that the woman in this case was a person of color, who at the time of the marriage in Spain was by the laws of Louisiana prohibited from contracting a marriage with a white man, would not affect the marriage in Spain between the same parties, nor would it affect the legal consequences of the marriage, such as the legitimizing the offspring before the marriage, notwithstanding the prohibition in the Louisiana law. The marriage being good and valid by the laws of Spain, it was also valid here. If, therefore, the law of Louisiana has been subsequently changed, and the prohibitions to the marriage between a white person with a person of color has been removed, then such children so legitimized by the marriage in Spain can inherit the estates of their parents in Louisiana the same as other legitimate or legitimized children.

**A**PPPEAL from the Second District Court of New Orleans. *Duvigneaud, J. George L. Bright*, for Mrs. Conté, appellee. *J. Ad. Rosier & Son and Lea, Finney & Miller*, for executor et als.

TALIAFERRO, J. The plaintiff Mrs. Conté, claiming to be the sole heir of J. M. Caballero, sues to set aside his will, to annul certain legacies contained in it and to be put in possession of the estate. Her

claims are opposed by the universal legatee and by the particular legatees. They aver that the plaintiff is illegitimate, her parents never having been married legally. That being born of a colored woman she could not have been acknowledged or legitimated by marriage under the laws of Louisiana prior to her father's decease, and that she is consequently incapacitated to receive anything from the estate of Caballero by inheritance as an heir. This is met by the averment that the father and mother of the plaintiff were married in Havana, where the laws of Spain are in force, and that the Spanish laws determine the condition and rights of the parties resulting from their marriage.

The judgment of the court below was in favor of the plaintiff. The executor has appealed.

Caballero, a native of Spain, came to New Orleans in the year 1832, became a citizen of the United States and lived in New Orleans until the year 1856, when he returned to his native country, taking Havana in his way, where he remained a short time. During his residence in Louisiana he lived in intimacy with a colored woman, by whom, it seems, he had several children, the plaintiff in this case being the only one of them now living. She was born in February, 1840. Caballero made an olographic will, dated March 21, 1852, and ratified it in January, 1856. After making various legacies for charitable purposes he constituted Basualdo his universal legatee, and named him as executor. In March, 1856, Caballero left New Orleans for Cadiz, in Spain, and at Havana, in April following, he was married to Carlina Visinier, the plaintiff's mother. He proceeded to Spain, where he resided about three years, and then returned to New Orleans, where he died in the spring of the year 1866. Under this state of facts it is important to ascertain whether the removal of Caballero to Spain was made *animo manendi*, with the purpose of being permanently there; for if he was merely sojourning in Havana and Cadiz, and went there temporarily for the purpose of legitimating his daughter by the marriage with her mother, and with the purpose of evading the laws of Louisiana, which at that period presented an impediment to the accomplishment of his purpose, a grave doubt might arise as to the legal effect in Louisiana of a marriage so contracted. We think, however, the evidence warrants the conclusion that in going to Spain his purpose was to spend the remainder of his life in his native country. It is shown that on his return he made declarations to that effect in Cadiz, and these declarations are strongly corroborated by several facts which seem to go far to establish the truth of these declarations. He was a man of ample fortune. He sold his family tomb in New Orleans for a large price and carried with him the remains of his children and placed them in a tomb which he had built

in Cadiz at an expense of \$25,000. He purchased there a costly dwelling house, made expensive repairs upon it, and resided in it with his family. It is fully proved that such a marriage as the one between Caballero and Carolina Visinter, that took place at Havana, is legal by the laws of Spain. A judicial order was rendered by a competent judge legitimating the daughter, and upon that occasion the record of her birth and baptism in New Orleans was transcribed in the record of baptisms in Havana.

We understand the rule to be well settled that marriages valid by the laws of the country where they are entered into, are held valid in any other country to which the parties may remove, unless there exists, from reasons of public policy, in the country to which they remove, some impediment by the laws of that country, or that such marriages are in derogation of good morals. In such exceptional cases comity could not be invoked to recognize their validity. How stands the matter in regard to the rights of Mrs. Conté, the plaintiff in this case? Here we may notice that this person, after her parents removed from Louisiana to Spain, never returned to Louisiana to live, and that she is a subject of the government of Spain. At the time of her legitimation by the marriage of her parents, marriage between white persons and free persons of color was prohibited by our law. The Louisiana law would not have recognized as valid in Louisiana the marriage of Caballero in Havana. What was the consequence, then, upon his return to Louisiana? It resulted that there was in this State no community of acquets and gains between the parties to that marriage. Had there been children born to them in Louisiana after that marriage, they would have been by our law illegitimate. Thus far would our law have extended and had effect when Caballero returned to Louisiana, but no further. Its edict, so far as it bore upon his marriage, was of local and limited effect. It existed for a purpose local and special in this country. That purpose could not have been more effectually carried out by withholding from persons abroad, legitimate by the laws of the country where they lived, the right of inheriting property in this State. It could not and did not aim to affect elsewhere the validity of a marriage like that of the parents of the plaintiff. It was strictly personal to parties living in Louisiana who had anywhere contracted the kind of marriage not permitted by its policy, and did not, as in the plaintiff's case, affect the children of such parents legitimated in other countries and not incapacitated here on other grounds. The policy of this State had no broader extent, because there was no reason why it should have. *Cessante ratione cessat et ipsa lex* Accordingly we find that there was not, at the period we have reference to, nor is there now, any law of Louisiana rendering Mrs. Conté incapable of inheriting in this State.✓

But conceding it to be true, as alleged, that by our law there existed an incapacity in the plaintiff to inherit, and that that incapacity was fixed at the opening of her father's succession, we should not regard it as fixed irrevocably. If the incapacity contended for existed, that condition was fixed relatively to the laws, the public policy and the general state of things then existing. It was not necessarily an irrevocable doom. It did not cut her off from benefits that might occur amid the ceaseless mutations of human affairs, from advantages that might arise in the future from a changed condition of law and public policy. Her rights resulting from her legitimacy by the laws of Spain were subsisting and continuing rights. They ran *pari passu* with the law and the public policy which incapacitated her until that law and policy disappeared, her rights surviving.

Mrs. Conté, as we have seen, was born in February, 1840, and her father's testament is dated in March, 1852, nearly twelve years after her birth. Did the testament fall by her legitimation in April, 1856? This presents another and a more difficult question. Article 1556 of our Civil Code, in the chapter that treats of donations *inter vivos*, adopting article 960 of the Code Napoleon, declares that "all donations *inter vivos* made by persons having neither children nor descendants actually living at the time of the donation, of whatever value those donations may be, and on whatever account they may have been made, should they even be mutual, not excepting such as were made in favor of marriage, by any but the ascendants of the married persons, or by the one of them to the other, shall be considered as revoked, up to the disposable portion by the birth of children to the donor, even of a posthumous child, or by the legitimation of a natural child, if the child be born since the donation." Article 1698 of the Louisiana Code, in the chapter that treats of donations *mortis causa*, declares that "the testament falls by the birth of legitimate children of the testator posterior to its date." There is no article of the Napoleon Code corresponding to this article.

The French authorities referred to by counsel do not seem to afford much aid in determining the proper interpretation of article 1698 of our Code. On the question now before us the weight of authority found in the writings of the French jurists would seem to be in favor of the affirmative side of the question; but the solution must mainly be sought for in the interpretation together of the articles of our Code, and in ascertaining the spirit and purpose of our legislators in constructing our law bearing on the question. The policy of our law is to reprobate concubinage and the rearing of spurious offspring, an evil so well calculated to demoralize society. On the other hand, marriage sanctioned by Divine authority is highly favored and encouraged. The lawmaker, by liberal provisions, enables and invites the parent

of illegitimate offspring to repair civilly the wrongs which he has inflicted upon his children, wholly innocent of the offense for which they are proscribed. Actuated by the strong desire in justice to relieve the innocent, and in the interests of society, the legislator holds out the strong inducement of conferring upon the unfortunate children of unmarried parents all the benefits of legitimacy. This benevolent purpose seems to be announced by article 219 of the Code, which declares that "children legitimated by a subsequent marriage have the same rights as if they were born during marriage."

In view of the reasons upon which the law expressed by this article is manifestly founded, we can not clearly perceive why the lawgiver should make any exception in conferring upon illegitimates the benefits of legitimacy. If they are to have the same rights that appertain to legitimates, the impression is strong that no right belonging to legitimates is withheld, otherwise the benefit proposed would, in its most essential feature, be to a great extent destroyed, for the right of inheritance would, in cases like the one at bar, be denied. When a parent legitimates by marriage his illegitimate children, it would seem to be a fair presumption that he desires they should have all the rights they would have possessed had they been born during marriage. A right consequent upon legitimacy at birth is that of annulling donations made by the parent previously. If children, illegitimate by birth and subsequently legitimated by marriage, are to possess all the legal rights of the other class—and this we may presume to have been the object of the parent in legitimating them—the article 1698 of the Code should be construed liberally to secure the right sought to be obtained by the commendable act of the parent. A liberal interpretation of article 1698 we think would not regard its provisions as forming an exception to article 219, and exclude one class of heirs from the benefits conferred upon another.

In the case of *Lewis v. Hare*, 8 An., p. 378, it was contended that a testament does not fall on the birth of a posthumous child, or at least it would be sustained to the extent of the disposable portion in conformity with the provisions of article 1556 in regard to donations *inter vivos*. But our predecessors held "there was no sufficient reason to narrow the terms of article 1698, which are unqualified and comprehend equally both classes of children." In support of the view taken of the comprehensive terms of article 1698, the court said: "There is no reason to suppose that a testator would have been insensible to the welfare of a posthumous child if the contingency of its birth had suggested itself to his mind, any more than to suppose such insensibility in the case of a child born before his death. In both cases it is reasonable to presume the testator would have felt the promptings of parental love and the obligations of parental duty if the event had been foreseen.

By parity of reasoning, and also from the facts in this record that show the fervor with which the testator in this case cherished the dust of his dead children, is it unfair to infer that after legitimating his daughter he intended to revoke his testament?—an act, however, which he did not perform, but which it may be said he overlooked or thought unnecessary after accomplishing her legitimation.

We think it is in conformity with the spirit of the decision in the case of *Lewis v. Hare*, just referred to, to conclude that the effect upon the testament of Caballero by the legitimation of his daughter is the same it would have been had her birth occurred posterior to the time at which it was made.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

LUDELING, C. J., *concurring*. This suit is brought by Maria Dolores Conté, the daughter of J. M. Caballero, to annul the will of her father, and to be put in possession of his succession on the ground that she was legitimated by the marriage of her parents after the date of the testament.

The evidence establishes that J. M. Caballero lived in this city in concubinage with Carolina Visinier, a colored person; that the plaintiff, issue of this illicit connection, was born in February, 1840; that in 1852 Caballero made the will which is attacked in this suit; and that in 1856 he removed to Spain, the place of his nativity, with the purpose to live there permanently.

On his way to Cadiz, in 1856, Caballero stopped at Havana and there he married Carolina Visinier, the mother of plaintiff. Three years after his removal to Spain he returned to New Orleans, where he died in 1866. The plaintiff has never returned to Louisiana; she still resides in Spain.

The evidence in the record satisfies me that the plaintiff was legitimated by marriage, according to the laws of Spain, in 1856. Being legitimate in Spain, I maintain that the same character will belong to her in Louisiana and everywhere. Story's Conflicts, sec. 105.

Mr. Story says: "It seems, then, generally admitted by foreign jurists, that as the validity of the marriage must depend upon the law of the country where it is celebrated, the status, or state, or condition of their offspring, as to legitimacy or illegitimacy, ought to depend on the same law; so that, if by the law of the place of the marriage (at all events, if the parents were then domiciled there), the offspring, although born before marriage, would be legitimated, they ought to be deemed legitimate in every other country, for all purposes whatsoever, including heirship to immovable property." Story's Conflicts,



sec. b. 93. And he adds: "This is certainly the doctrine maintained by many, perhaps a large majority of foreign jurists." Sec. c. 93. And again he says: "The same doctrine is avowedly adopted by the courts of England. Lord Stowell on one occasion in effect maintained that by the law of England the status or condition of a claimant must be tried by reference to the law of the country where that status originated. The same doctrine was adopted by the judges of England in giving their opinion to the House of Lords. They admitted in the most solemn form, that the legitimacy or illegitimacy of a person must be decided by the law of the place where the marriage was celebrated; and that if by the law of that place (for example Scotland) a son born before the marriage between them be legitimated, that status of legitimacy must be deemed equally true and valid everywhere else where the question might arise." Sec. 93, e.; sec. 93, m. And the same author says (sec. 103): "Hence we might deduce, as a corollary, that, in regard to questions of minority or majority, competency or incompetency to marry, incapacities incident to coverture, guardianship, emancipation and other personal qualities or disabilities, the law of the domicile of birth, or the law of any acquired and fixed domicile, is not generally to govern, but the *lex loci contractus aut actus*, the law of the place where the contract is made, or the act done."

In this State this principle is substantially announced in the textual provisions of the Codes. Article 10 of the Civil Code declares that "the form and effect of public and private written instruments are governed by the laws and usages of the country where they are passed or executed." C. P., art. 13. That is, the validity as well as the effect of contracts must be governed by *lex loci contractus*. The contract of marriage between the plaintiff's parents and its effects must therefore be governed by the laws of Spain.

This principle has often been affirmed by this court. 3 Martin 66, *Le Breton v. Nanchet*; 8 M. 134; 2 N. S. 93; 4 N. S. 1; 5 N. S. 570, *Saul v. His Creditors*; 19 La. 216; 11 La. 464, *Andrews v. His Creditors*; 8 R. 407. In *Scott vs. Key*, reported in 11 An., this court said: "If it be true that a general law of the place of domicile changing the status of its citizens according to circumstances is a personal statute accompanying the party to every other country—provided the circumstances which operate such change have occurred before the change of domicile, which we consider to be the settled doctrine in Louisiana—a *fortiori*, is a special law removing a disability from a particular citizen by name such a statute." \* \* "The maxim cited by Story (*Conflict of Laws*, sec. 51) from Boullenois, '*habilis vel inhabilis in loco domicilii est habilis vel inhabilis in omni loco*,' must, therefore, be deemed law in Louisiana." And it was held in the same case that the Arkansas statute (which was a personal statute) did not conflict with the statute of distributions of Louisiana, which is a real statute.

The case of Dupre v. Boulard, 10 An., p. 411, relied on by the defendants, is not in point. It appears from the opinion that the marriage in that case had been made in fraud of our laws. I consider the question presented by the facts of this case the same as if Caballero and his wife had always resided in Spain. In that event, could the plaintiff claim the annulment of her father's testament, made anterior to her legitimation? I am of opinion that she could. Article (1698) 1705 C. C. declares that "the testament falls by the birth of legitimate children of the testator posterior to its date."

The French text is, "le testament est caduc quand il est survenu des enfans depuis qu'il a été fait."

It is evident that the meaning of this article is that the will should fall if the testator should have children capable of inheriting from him after the date of the will. At the period when the will was made Caballero had no child who could inherit his estate; after the legitimation of the plaintiff he had then such a child. Legitimation is a fiction of the law, whereby one born out of lawful wedlock is considered the offspring of the marriage between the parents. Article 199 of the Civil Code declares "children legitimated by a subsequent marriage have the same rights as if born during marriage." The French text is an exact copy from the Code Napoleon, and is as follows: "Les enfans légitimés par le mariage subséquent ont les mêmes droits que s'ils étaient nés de ce mariage." It is evident that there is an inaccuracy in the English translation; it should have been translated "as if born of that marriage." This accords with the evident intention of the lawmaker, and with the views of the commentators on the Code Napoleon. Commenting on article 953 of the Code Napoleon, Marcadé says: "La légitimation est une fiction; mais cette fiction au lieu de faire remonter le mariage au jour de la conception ou seulement au jour de la naissance, fait redescendre et la conception et la naissance au jour du mariage." 2 Marcadé, p. 45. Zacharie says: "La légitimation est une fiction légale, mais elle n'a jamais d'effet rétroactif; elle ne remonte ni au jour de la conception ni au jour de la naissance; elle ne date qu'à partir du mariage." P. 675. "C'est le jour du mariage qui est le jour de la conception et de la naissance légitimes: Dies nuptiarum, dies est conceptionis et nativitatis legitimæ." 2 Marcadé, p. 46. Pothier, vol. 7, Traité des Donations Entre-vifs, p. 489, sec. 111.

This court said in Lewis v. Hare: "The testament falls by the birth of legitimate children of the testator posterior to its date. The reason of this provision is not given by the lawgiver, but is obvious. It is founded upon the reasonable presumption that the testator would not have given his property to others had he foreseen that he would afterwards have offspring. It would not be easy to suggest a case

more strongly illustrative of the wisdom of the law, which supplies by its own foresight the want of foresight of the testator, than the one before us. If this will should be carried into full effect the entire estate of the testator would be absorbed in legacies, and his child be left destitute." 11 An. 378.

All that was said in that case applies with equal force in this case. I can not believe that the word "birth," in the English ("s'il est survenu des enfans" in the French) text, was intended to refer only to the natural birth of children, but to the advent of legitimate children by birth or by operation of law.

The laws of Louisiana never prohibited persons from inheriting on account of their color. "All free persons may transmit their estate *ab intestato* and inherit from others. Slaves alone are incapable of either." C. C., article 945.

"Legitimate children or their descendants inherit from their father and mother," etc. C. C., article 898.

It is not against the policy of the laws of Louisiana, therefore, to permit the plaintiff, a legitimated child, to take by inheritance the property of her father.

Neither has it ever been the policy of Louisiana to attempt to regulate marriages beyond her territorial jurisdiction.

I therefore concur in the opinion of Mr. Justice Taliaferro.

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HOWELL, J., *concurring*. For the reasons assigned by the Chief Justice, I concur in the decree in this case.

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WYLY, J., *dissenting*. A contract, if valid in the country where it is made, is valid everywhere, because the law of the place is the law of the contract. But this general rule has its exceptions. A contract against good morals, religion or the policy and institutions of the State where it is sought to be enforced, will not be recognized and pronounced valid, although it may be held valid in the country where it was made.

A contract for future prostitution; a contract to promote or reward the commission of crimes, and a contract for obscene publications are examples of the class founded in moral turpitude.

"Contracts made in a foreign country to procure loans in our own country, in order to assist the subjects of a foreign State in the prosecution of war against a nation with which we are at peace; contracts by our citizens or others to carry on trade with the enemy, or to cover enemy property, or to transport goods contraband of war; contracts to carry into effect the African slave trade," are examples of contracts

opposed to national policy and institutions. Such contracts are excepted from the general rule, because they are prejudicial to the interest of the nation and are repugnant to its policy. Story on Conflict of Laws, sections 32, 36, 38, 245, 258, 259, 324; 13 Pet. 519.

The general rule that the contract of marriage, if good in the country where it is celebrated, is good everywhere, has likewise exceptions. An adulterous or incestuous marriage will not be recognized in this country, though valid where it was contracted, because it is against the policy of the State and the solid interest of society.

If an inhabitant of Turkey should emigrate with several wives to this State, his women would not have the status of wives here, although legally married at home, because our law condemns polygamy. When Caballero, a citizen of this State, married his colored concubine, Carolina Visinier, at Havana, in April, 1856, such marriage was prohibited, because the policy of this State was against the marriage of white and colored persons. C. C. 95. This marriage, though celebrated in the dominion of Spain and valid by its laws, can not be recognized as valid here.

In *Dupre v. Executor of Boulard*, 10 An. 411, it was held that: "The courts of Louisiana will not give effect to a marriage or to a marriage contract entered into in France between a white person and a person of color." Suppose, instead of seeking the dominion of Spain to make the contract of marriage with his colored concubine, which he was prohibited from making at home, Caballero had gone with a dozen of white concubines to Turkey and there married them, and after an absence of three years had returned with his women to this State, would they be entitled here to the status of married women, although at the time of the marriage it was contemplated that Turkey should be their future home and the marriage was valid by the laws of that empire? Is polygamy to be forced upon this State by such devices? Surely not. Foreign contracts can not be sanctioned and enforced where they are prejudicial to our own country or its citizens. The policy of the State and the safety of its institutions are considerations paramount to the courtesy due to laws of other countries or contracts made in conformity therewith.

The policy of our law, announced in article 95 C. C., prohibiting and declaring void marriages "contracted by free white persons with free persons of color," is in my opinion superior to any obligation founded on the comity of nations, to give effect to the laws of Spain or to the marriage contracted in conformity therewith by Caballero with his colored concubine, Carolina Visinier, in the year 1856.

But it is urged that the policy of this State has been changed, and there is nothing now repugnant to the marriage of such persons. If this be granted it would not affect the validity of a marriage con-

tracted and subsequently terminated by the death of the parties before this change of policy.

Caballero left this State in 1856 for the undoubted purpose of marrying, in the dominion of Spain, Carolina Visinier, a native of this State, with whom he had lived in concubinage for many years. After an absence of three years they returned to this city and lived the remainder of their lives, Carolina dying in 1860 and Caballero in 1866.

What was the status of Carolina Visinier at the time of her death in 1860? Was she the concubine of Caballero or was she his lawful wife? Her status must be determined by the law in force at the time of her death. If she was his wife she was entitled to half the community property, and by succession transmitted it to her heir, the plaintiff, Mrs. Conté. If she was his concubine she was possessed of no legal rights, and was incapable of receiving even a donation from Caballero.

In my opinion the status of Carolina Visinier was that of a concubine by the laws of this State, of which she was a native, notwithstanding the marriage and three years residence in Spain, because no residence or contract made in a foreign land could give her, a native, a better status at home than she was capable of receiving by its laws, and because the contract of marriage, though lawful in Spain, was utterly without effect in this State, being at the time in contravention of its policy.

The change in our laws, under the constitution of 1868, can not be considered in determining the validity of the contract of marriage made in 1856 and terminated by death in 1860, which was by law at the time prohibited and declared void. C. C. 95.

As laws have no retroactive effect, the omission to incorporate article 95 of the Code of 1825 in the Revised Code of 1870 is of no consequence. It was the law prevailing at the time of the marriage and at the time of the death of both the spouses.

The law of this State must also determine the status of the plaintiff Mrs. Conté, who was born in this city in 1840, the illegitimate daughter of Caballero and Carolina Visinier. Her legitimation was prohibited by the law of this State, and no contract of marriage between her parents, nor any agreement on their part to change the place of their domicile, could alter her status and give her a better position at home than she was capable of acquiring. The law of this State at the time of her birth, at the time of the pretended marriage of her parents, and at the time of their death, gave her the status of a bastard, incapable of being legitimated, because the offspring of an illicit cohabitation between a white person and a person of color. An incestuous or adulterous bastard, born in this State, will always have the same status, notwithstanding the subsequent marriage of his parents, either at home

orabroad. The law of the domicile of birth fixes the status of the person suing at that domicile, regardless of the status acquired by him in another country.

The plaintiff holding by the laws of Louisiana, the domicile of her origin, the status of a bastard, incapable of legitimation and incapable of inheriting, seeks to be declared by the courts of this State the legitimate daughter of Caballero, solely because she has acquired that status in Spain, a foreign country. She seeks to annul the will of a citizen of Louisiana and to be put in possession as heir of his succession, notwithstanding her incapacity to inherit according to the law of this State, where she was born and where her parents lived and died.

She points to the contract of marriage made by her parents when she was sixteen years old, in the dominion of Spain, and to the *ex parte* decree of her legitimation by a tribunal of that country, and insists that by the comity of nations this court should give effect thereto and maintain her demand as the legitimate heir of Caballero, notwithstanding such marriage and legitimation were prohibited and declared void by the law of this State, and notwithstanding the record shows that at that time her parents were citizens of this State, being then only absent from it about thirty days. The law of this State, the domicile of the deceased, must control in determining the capacity of his heirs, and foreign laws must yield to our own in fixing the personal status of the plaintiff, because this is the domicile of her birth. Mr. Justice Story in his work on the Conflict of Laws, page 91, section 93, says: "It is plain from what has been already stated and, indeed, is directly established by their positive declarations, that those of the foreign jurists already mentioned who affirm the general doctrine of the universality of the rule that capacity and incapacity depend upon the law of the domicile of birth, and that it equally applies to movable and immovable property situate in foreign countries, would hold the same rule applicable to the question of legitimacy or illegitimacy in regard to the inheritance of real property in all foreign countries."

In the celebrated Scotch case referred to by Judge Story, where the question was whether a son born of Scottish parents in Scotland before marriage, but who afterwards married there, could inherit lands in England as heir—a case tried in the House of Lords and in which was employed the first talents of England—it was conceded on all sides that legitimacy was a status to be determined by the law of the party's birth-place.

"Another question (says Judge Story) also has arisen in England, whether a child born before marriage in one country, of parents domiciled in that country, by whose laws a subsequent marriage would not legitimate him, would by a marriage of his parents in another

country, by whose laws such subsequent marriage would legitimate him, become legitimate so as to inherit lands in the latter country. It has been held by the House of Lords that the mere fact of marriage in such country, where there was no change of domicile, would not give him such a capacity to inherit land, and that the stain of illegitimacy by his birth was not wiped away by such marriage. And it was intimated that under the like circumstances in other respects the change of the domicile of the parents to the country where the marriage was celebrated would not have given any better title to inherit, as the stain of illegitimacy would be indelible. The converse case has been decided in France, where it has been held that if a child is born in a country (France) where he would become legitimate by a subsequent marriage, he will become legitimate by such subsequent marriage, although the marriage should take place in a country (England) where a different law prevails, and where a subsequent marriage would not have the effect of rendering him legitimate. The result of these two cases seems to be that the law of the place of birth of the child, and not the law of the place of the marriage of the parents is to decide, whether a subsequent marriage will legitimate the child or not." Story on Conflict of Laws, p. 91, section 93.

Judge Story says, also, that the same doctrine is maintained by Hertius, by Bonhier, by Boullenois, and by Merlin, viz: "That the law of the place of the birth of the child gives the rule as to legitimacy by a subsequent marriage."

Now, if the marriage of Caballero and Carolina Visinier, although valid in Spain, is held to have had no effect in Louisiana, then the plaintiff's claim, as the legitimate heir of Caballero, falls to the ground. But to defeat her pretensions it is not necessary to decide that that marriage was without effect in Louisiana, because legitimation is merely an incident—it is not of the essence of the contract of marriage. A marriage contracted in England subsequently to the birth of a son would not legitimate him, although such marriage would unquestionably be valid.

The marriage of English subjects domiciled in France, and there valid, would be recognized in England; but such marriage would not, in England, have the effect to legitimate an illegitimate child born of such persons in that country before going to France. Why? Because the law of the domicile of birth fixes the status of the child. This is unquestionably so when the adjudication of the question is sought in the courts of that domicile. I venture the assertion that there is no respectable authority to be found which maintains that the courts at the domicile of birth are required to look beyond the laws of the place in order to fix the status of the child.

It is the right of every country to determine by its own laws and for

itself what status it will give to the children of its subjects or citizens born within its own limits.

No change of domicile and no act or contract between the parents of an illegitimate child can give it at the domicile of birth a better status than it is capable of acquiring by the laws thereof.

It would be vain to fix the order of successions, and to establish the rule of the capacity or incapacity of heirs born in this State, if foreign laws or foreign contracts are to be admitted to defeat their operation.

It results, therefore, both from principle and upon authority that, as the marriage of Caballero with Carolina Visinier, if made in this State, would not have legitimated the plaintiff, their illegitimate daughter, the marriage which they contracted in the dominion of Spain in 1856 did not legitimate her.

Their marriage here would not have legitimated her, because of the operation of article 95 C. C., which prevailed till after the death of both her parents. It would not have legitimated her even if Caballero had been a colored man, because she was neither acknowledged by him in a notarial act nor at the registry of birth or baptism. *Thomasson v. Raphael's Executor*, 11 La 128. ✓

Much has been said of the benevolent purpose announced in article 219 C. C., which declares that: "Children legitimated by a subsequent marriage have the same rights as if they were born during the marriage." That it should be liberally construed because its purpose was to encourage marriage by holding out the strong inducement of legitimation to the parents of illegitimate children, as the means by which to repair the wrong inflicted on them. That this was its purpose I have no doubt, because concubinage is reprobated by law, and marriage is a highly favored institution. But this article was only intended to encourage the marriage of such persons as are capable of contracting it under the laws of this State. It was not intended to invite the marriage of "a free white person with a free person of color," because such marriage was prohibited by article 95 C. C. Nor was it intended to invite persons prohibited from marrying at home to seek a foreign country and there contract a marriage prohibited by our law.

It would be a reproach to the authors of our Code to say in adopting article 219 they intended to invite the marriage of white persons with persons of color, either at home or abroad, because a marriage of that character is expressly condemned and declared void by article 95 C. C. It results, therefore, from a fair interpretation of article 219 that a marriage of the character of that contracted by Caballero with Carolina Visinier in 1856 was not such a marriage as was intended to be embraced in its meaning. To hold that the marriage of a white per-



son with a person of color, either at home or abroad, falls within the provision of article 219, would violate its spirit and obvious purpose, and would, as Judge Story says, be keeping the letter of the law to the ear and breaking it to the sense.

There being, therefore, no law in this State to legitimate by subsequent marriage the child of a white person with a person of color, because such marriage is not embraced in the meaning of article 219, the marriage of Caballero with Carolina Visinier, in the dominion of Spain, in April, 1856, did not legitimate the plaintiff, their illegitimate daughter, who was born in this city, in 1840.

Legitimation being merely an incident of marriage and not of the essence of the contract, the marriage of her parents might be held to be valid and yet the legitimation of the plaintiff would not be a necessary consequence.

The laws of this State not giving legitimation to a subsequent marriage like that of her parents, their marriage in Spain did not have the effect to legitimate her, because the rule is "the law of the place of birth of the child, and not the law of the place of the marriage of the parents, is to decide whether a subsequent marriage will legitimate the child or not." Story on the Conflict of Laws, page 91, section 93.

But it is urged that this rule is contradicted by Justice Story, in section 103 of the same work. Let this section be read with section 105, and in connection with the preceding ones, especially sections 73 and 93, and not the least contradiction will be found. The learned author has stated the rule clearly in section 93, and he is not weak enough to contradict himself flatly in the tenth section following.

It is also contended, on the authority of *Scott v. Key*, 11 An. 238, that this court ought to recognize the plaintiff as legitimate, because she acquired that status by the marriage of her parents in Spain.

The authority cited does not maintain the position, nor does it in the least contradict the rule that "the law of the place of the birth of the child, and not the law of the place of the marriage of the parents, is to decide whether a subsequent marriage will legitimate the child or not."

As the concurring opinion of Mr. Justice Spofford in the *Scott* case will show what was decided, I will copy it in full, it being very brief. It is as follows:

"It was competent for the Legislature of Arkansas, the domicile of his origin, to fix the status of William Estill. In substance and effect that Legislature gave him the status of a legitimate son of Samuel Estill. The Arkansas statute legitimating William Estill was a personal statute. Therefore the status of a legitimate son of Samuel Estill would accompany William Estill into whatever country he might go. He came hither with the status. He inherited by our law from

his father Samuel Estill, because he was to all intents and purposes a legitimate son, having become so by the law of the domicile of his origin, and not in fraud of our law nor in violation of its policy."

How an authority, recognizing the legitimation of a party at the domicile of his origin in a case not in fraud of our law, nor in violation of its policy, can support the case of the plaintiff, who was not legitimated at the domicile of origin and whose legitimation by the marriage of her parents was prohibited by our law and in violation of its policy," I can not imagine.

In *Barera v. Alpuente*, 6 N. S. 69, a case analogous to the one before us, Judge Porter, the organ of the court, said: "The general rule is that the laws of the domicile of origin govern the state and condition of the minor into whatever country he removes."

In *Brosnahan et al. v. Turner*, 16 La. 439, this court, in speaking of a foreign statute, said: "Nor can we examine the validity of the legislative act, where it operates on property within their jurisdiction, or authorizes acts of its own officers. But its extra territorial effect is a different affair, which we protest against admitting when it comes to operate on the right of real property within the State, or even supposing it to be what plaintiff contends it to be, a mere removal of a personal incapacity. If this incapacity relates to the inheritance of real estate in Louisiana, we are bound to say they can have no effect."

In conclusion, therefore, I maintain that the marriage at Havana, in April, 1856, being repugnant to our law, was utterly without effect in this State; and the marriage being without effect the legitimation of the plaintiff as an incident thereof was also without effect. But whether the marriage was without effect or not, the legitimation of the plaintiff was not a necessary consequence, and it did not result from the marriage, because the plaintiff was incapable of legitimation by the law of her domicile of birth; that in suing for the succession of her father she can not set up a foreign status of legitimation as a ground for inheriting, because that status was not acquired at the domicile of her origin, and, on the contrary, is repugnant to its policy.

The status of the plaintiff is fixed by our law, because her parents were citizens of this State, and this is the domicile of her origin. She can not expect this court to recognize a foreign status prohibited by the law of her birth-place.

I therefore think that the plaintiff's demand should be rejected, and the will of Caballero ought to be maintained; and for the reasons given I dissent in this case.

**NO. 3018.—BRAMSTEIN & BENDER et al. v. THE CRESCENT MUTUAL INSURANCE COMPANY.**

A party who obtains a commission to take the testimony of witnesses named, is not bound to take the depositions of all the witnesses named in the commission, under penalty of the exclusion of the testimony of those which have been taken.

The testimony of the clerk of the court and the attorney for plaintiff is admissible to show that the commissioner who took the testimony failed to annex the commission to the testimony before returning it into the clerk's office.

It being shown to be a custom to consider all cotton shipped to a merchant as covered by an open policy of insurance, unless the contrary is expressed in the bill of lading:

**Held**—That where no such reservation is expressed in the bill of lading, the insurance company is bound, in case of loss, for all the cotton shipped.

**A** PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Wallace & Handlin*, for plaintiffs and appellees. *M. M. Cohen*, for defendant and appellant.

This case was tried by a jury in the court below.

**LUDELING, C. J.** The plaintiffs claim of the defendant four thousand and ninety-one dollars and four cents, with legal interest from the first of March, 1866, as the amount of insurance due on twenty bales of cotton shipped on the twenty-sixth of February, 1866, at Shreveport, on the steamer *Mary Hein* to Fred Del Bondio, and by him insured for them on his open policy with the defendant; and which cotton was destroyed by fire on said steamer.

The plea of *lis pendens* was properly overruled. The Supreme Court having rendered a judgment of non-suit in the first case, that suit was ended when the judgment of non-suit became final. The defense was a general denial. The case was tried by a jury, who rendered a verdict for the amount claimed, and the defendant has appealed. The defendant took three bills of exceptions during the trial of this cause, which we will proceed to notice.

On the trial of a rule to show cause why testimony taken by commission should not be read, the defendant objected to the evidence filed on the twenty-seventh of November, 1869, because two witnesses named in the commission, Pendery and Korty, were not examined, and no reason was assigned by the commissioner why the testimony was not taken. None was necessary. We know of no law which compels a party to take the testimony of every witness named in a commission, under the penalty of having the testimony which was taken rejected. Neither has the defendant furnished us with any reason or law to sustain his objection.

To the testimony filed on the seventeenth of February, 1870, he objected, because no commission was annexed thereto, and he objected to the reception of evidence to explain away his said objection. The evidence received by the judge *a quo* showed that the commissioner who had taken the testimony had failed to return the commission with

the testimony, but that it had afterwards been forwarded with an explanation of the neglect. The clerk and attorney for plaintiff proved that the commission was sent with the interrogatories, and the one returned afterwards was the same which had been sent. We think the judge *a quo* ruled correctly in receiving the evidence, under the circumstances.

We deem it unnecessary to pass upon the other bills of exceptions in the record, because the evidence in the record is sufficient to establish the plaintiffs' case, if we exclude the evidence objected to by defendant in the other bills of exception.

On the merits but one question seems to be disputed—that is, that the twenty bales shipped on the Hein and destroyed, were covered by the open policy of Del Bondio.

On this point the proof is abundant. George Naylor and A. Pendery, for whose account the cotton was shipped, swear that they had instructed Fred Del Bondio, their consignee, to insure all consignments by them under his open policy. This is corroborated by the testimony of Charles Del Bondio, the brother and clerk of Fred Del Bondio. Naylor and Pendery further swear that before shipping the cotton, a Mr. W. H. Benton, an insurance agent at Shreveport, called on them to induce them to insure in the company he represented, but they declined on the ground that the cotton was insured under the open policy of Del Bondio. It is also proved to be a custom to consider all cotton shipped to a merchant who has an open policy as covered by it, unless it is expressed to the contrary on the bill of lading. The bill of lading in this case contains no such expression. And it further appears that on two other shipments of cotton by said parties to Del Bondio during the same month premiums were received from Del Bondio for the same by defendant. The telegrams sent by Naylor and Pendery do not militate against this view of the case. They instruct to insure for \$225 per bale, whereas their former insurance was only \$200 per bale—less than enough to cover loss, as appears from the evidence in this case.

We think, however, the verdict of the jury erroneous in allowing \$4091 04. In the policy the cotton is valued at \$200 per bale; twenty bales at that price would equal \$4000, from which the premium, \$138 34, must be deducted. And there was further error in allowing interest from first of March, 1866.

It is therefore ordered and adjudged that the verdict of the jury and the judgment of the court *a qua* be amended so as to reduce the amount of the judgment to three thousand eight hundred and sixty-one dollars and sixty-six cents, to bear interest at the rate of five per cent. per annum from the sixth of May, 1866, till paid.

It is further ordered that the defendant pay the costs of the lower court, and that the plaintiffs and appellees pay the costs of this appeal.

## No. 2639.—JOSEPH B. HUBBARD v. SUSAN D. MOORE.

24 591  
1105 182

A dealer in furniture or other articles of commerce has the right to trade with and make sales of furniture to a person engaged in keeping a house of prostitution, and the courts will enforce such right by compelling the person who purchases the furniture to pay for it, although it be shown that the vendor knew at the time of the sale the use to which the furniture was to be applied.

**A** PPEAL from the Fifth District Court, parish of Orleans. *Cooley, J. L. Madison Day*, for plaintiff and appellant. *J. Ad. Rosier* and *M. Du Buisson*, for defendant and appellee.

**TALIAFERRO, J.** The plaintiff sues for \$2167 15, with interest, being an alleged balance due him of the price of a lot of furniture sold by him to the defendant.

The answer is a general denial. The purchase of the furniture is admitted, but the defendant avers that she purchased it to be used in a house of prostitution kept by her, and that the same was to be paid for from time to time as she might be able to do by success in business, but failing in which she is unable to discharge the debt.

She alleges that the contract entered into by her and the plaintiff in regard to the furniture is one reprobated by law and contrary to good morals.

There was judgment in the court below dismissing the plaintiff's action as of non-suit, and he has appealed.

The evidence, we think, sufficiently establishes that the plaintiff, when he sold the furniture to the defendant, was aware of her character and business, but it fails to show that in supplying her with furniture there was any intent on his part to aid or sanction her course of vice and abandonment. He lived in Cincinnati. The furniture, it seems, was sold at different times, much the larger lot of it by the plaintiff's agent in New Orleans. A portion of it was sold by the plaintiff himself when on a visit to this city. The defendant was allowed a credit to make payments, and she did pay amounts at different times, making an aggregate of \$380. The plaintiff had furniture to sell, and his object was to find buyers; the money of the Cyprian was as useful to him as that of any other person. That he entered into a contract with the defendant to benefit himself at the expense of morals we are by no means satisfied. The allegations of the defendant's answer, aiming to create the impression that he promoted the interests of the defendant by supplying her with furniture on terms of credit to facilitate her success in a career of vice and infamy on her part, in order thereby that he might be benefited himself, are not made good by proof. We can not attribute such a motive to him. Clearly a distinction ought to be drawn between acts done manifestly in derogation of public morals and purposely to promote vice and immorality, and acts not having such manifest purpose

or tendency, but which might remotely and indirectly be auxiliary to that object. In acts of the latter class there would be no absolute violation of public morals. A *turpis causa* would not arise in such a case to vitiate a contract in which the offense against morals would be merely conjectural. To the vicious and depraved, as well as to the good and the virtuous, belong the right to acquire the needs and comforts of a common humanity. A different doctrine would adopt the visionary notion that "there is to be no more cakes and ale." The fair dealer who by lawful contract furnishes the dissolute with the necessities and conveniences of life should not be debarred the right of enforcing payment for his goods by the effrontery of his vendee asserting in a court of justice that the things furnished were obtained for the express purpose of putting them to disreputable uses. The seller who furnishes an article adapted to a legitimate and proper purpose is not responsible in a court of morals, and much less in a court of law, for a subsequent perversion of its use by the buyer. In the case at bar it is shown that the furniture was sold at cash prices, with time given for payment. The seller, there is no doubt, knew that it was to be used in a house of ill fame, but how his knowledge of that fact involves him in the guilt of the inmates of that house, as an aider and abetter of lewdness and depravity, we think is not apparent. Although it is not shown that when he delivered the furniture he told the defendant to go her way and sin no more, it is not thence to be inferred that he encouraged her in continuing in her immoral course of life. That he contributed to enable her to continue it by selling her the furniture is too vague, hypothetical and remote to form an impediment to his recovery on the contract.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed. It is further ordered that the plaintiff recover from the defendant two thousand one hundred and sixty-seven dollars and fifteen cents, with legal interest from judicial demand. It is further ordered that the plaintiff's priority of lien and privilege upon the property attached be recognized, and that the same be sold according to law and its proceeds applied to the payment of this judgment—the defendant and appellee paying costs in both courts.

HOWELL, J., *dissenting*. I am constrained to think that the principle on which the majority of the court base their conclusion must apply to all contracts with an immoral or illegal purpose, and that all contracts of whatever species may be enforced if one of the parties can say that he did not derive profit or benefit directly from the illicit gains or vocation. I understand that the whole doctrine of avoiding

contracts for illegality and immorality is founded on public policy, and not on the interests of the contracting parties.

This subject was elaborately reviewed by the United States Supreme Court in the case of *Hanauer v. Doane*—Wallace, and many English and American authorities cited, and in which it was said: "It is certainly contrary to public policy to give the aid of the courts to a vendor who knew that his goods were purchased, or to a lender who knew that his money was borrowed for the purpose of being employed in the commission of a criminal act injurious to society or to any of its members; and that the vendor can not be permitted to stand on the nice metaphysical distinction that although he knows that the purchaser buys the goods for a highly immoral purpose, he does not sell them for that purpose." And they quote as applicable to the subject the words of Chief Justice Eyre, in *Lightfoot v. Tenant* (1 Bos. & Pul. 551, 556), who said:

"The man who sells arsenic to one who he knows intends to poison his wife with it will not be allowed to maintain an action on his contract. The consideration of the contract, in itself good, is thus tainted with turpitude which destroys the whole merit of it. \* \* \* No man ought to furnish another with the means of transgressing the law, knowing that he intended to make that use of them." On which Judge Story remarks: "The wholesome morality and enlarged policy of this passage make it almost irresistible to the judgment; and, indeed, the reasoning seems positively unanswerable." Story's *Conflict of Laws*, section 253.

It is not denied, but seems conceded, that the plaintiff in this case knew that the furniture, for the price of which he is suing, was sold for the purpose of furnishing a house of prostitution; and no one will deny that such a purpose is highly immoral and injurious to society. He has the distinction of having enabled the defendant to establish and conduct her vocation of demoralizing society and undermining the very basis of its fabric, which she could not have done, at that at least, without his aid. Can he wrap himself up in his own selfishness and heartless indifference and say, what business is that of mine? Am I the keeper of the defendant's conscience? The answer, I think, is plain: He voluntarily aids in the perpetration of a heinous wrong upon virtue, and must be taken to intend the consequences of such act.

In the case of *Pearce et al. v. Brooks*, in the Court of Exchequer (five judges), decided at the Easter Term, 1866, and reported in the *Law Reports*, vol. 1, p. 213, "the defendant, a prostitute, was sued by the plaintiffs, coach builders, for the hire of a brougham. There was no evidence that the plaintiffs looked expressly to the proceeds of the defendant's prostitution for payment; but the jury found that they

knew her to be a prostitute, and supplied the brougham with the knowledge that it would be, as in fact it was, used by her as a part of her display to attract men. Held—That the plaintiffs could not recover.”

Here similar equal knowledge was had by plaintiff, and he should not recover.

The vocation of defendant was not essential to the sustenance of life. Selling her over twenty-five hundred dollars worth of furniture, on a credit, to fit up a house for the purpose known to plaintiff was something more than supplying a fellow-creature with a bed for necessary sleep.

I must dissent from the reasoning and conclusion of my associates. Rehearing refused.

NO. 3969.—STATE ex rel. GEO. E. BOVEE v. F. J. HERRON.

To maintain the plea of *res judicata* the cause of action must be the same. In this case the relator brought suit for the office of Secretary of State, on the alleged ground that the act of suspension by the Governor was unconstitutional and void. Judgment was rendered in favor of the defendant on that plea.

Relator afterward brought this suit for the same office, on the allegation that the non action of the Legislature on the suspension restored him to the office. To this suit defendant urged that the first judgment was *res judicata*.

Held—That the cause of action not being the same in the two suits the plea of *res judicata* could not be sustained.

A public officer, such as the Secretary of State, who has been suspended from his functions by the Governor is entitled to resume his office immediately after the adjournment of the next General Assembly, provided no action has been taken on the suspension during the session, and his exclusion thereafter is an active, arbitrary violation of his legal and constitutional rights as such.

**A**PPPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. S. Belden*, Attorney General. *A. P. Field* and *J. Q. A. Fellows*, for relator. *Hays & New*, for defendant.

HOWELL, J. On the twenty-ninth of August, 1871, the Governor suspended George E. Bovee from the office of Secretary of State for alleged malfeasance in office, and appointed F. J. Herron to discharge the duties thereof (in the language of the order of suspension) “until the Legislature shall act upon the subject in accordance with the constitution.” On the sixteenth of February, 1872, he presented specific charges against said Bovee to the Legislature, convened on the first of January preceding, and requested that, if the charges be sustained, Bovee be impeached; and the matter was referred to a special committee who, after hearing the witnesses on both sides, made a report, on the last day of the session, of an indefinite character, upon which no action appears to have been taken by the General Assembly. Soon after the adjournment Bovee instituted this proceeding under the intrusion act, stating as his cause of action that the suspension only



operated until the Legislature should act on the subject, and not having done so, he was entitled to the office. From a judgment against him he has appealed.

We find annexed to the record a motion to dismiss the appeal, "on the ground that it is not made returnable according to law." There is no intimation in what respect it is not made according law, and we can discover no irregularity upon which the motion can be maintained, and it is therefore denied.

We find also in the record the plea of *res judicata* opposed by defendant to the demand in the usual form, that the same matter has been determined in a former suit between the same parties in favor of defendant and the appeal therein dismissed, the judgment thereby becoming final. The record of that suit is before us, and it shows the cause of action to have been the want of authority in the Governor to suspend the relator, which, however erroneously, may be considered as definitely settled adversely to the relator, as between the said parties. But the cause of action in this suit is a different one, and has acquired its force since the institution of the other, to wit, that by its terms the order of suspension "was operative only until the meeting and adjournment of the General Assembly of the State, then next following the suspension," and the said General Assembly having adjourned and expired without having impeached the relator, or in any manner acted upon the matter, he was thereafter not subject to nor affected by the suspension. The plea was properly overruled.

On the merits the case is so clearly with the relator as to need no argument.

Admitting that by sheer accident or neglect in taking the appeal in the former proceeding, the law of this case, as between these parties, sustains the suspension by the Governor of an officer, for whose suspension in such way neither the constitution nor any statute has made provision or given any sanction, it was to have effect only until the Legislature should have an opportunity to impeach him. This not having been done, he was unquestionably entitled to resume the functions of his office, in this instance, immediately upon the adjournment of the Legislature, and his exclusion was an active, arbitrary violation of his legal and constitutional rights as Secretary of State for the remainder of the term for which he was elected.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment declaring George E. Bovee to be Secretary of State under the constitution and laws of Louisiana, and that he be forthwith restored to the full possession of said office, with all the books, papers, archives, seal, furniture, etc., belonging or appertaining thereto, and to the undisturbed exercise of all the duties thereof, with costs in both courts.

NO. 4073.—STATE ex rel. G. DE FERIET and J. G. MONROSE, Executors,  
v. THE JUDGE OF THE SECOND DISTRICT COURT, PARISH OF  
ORLEANS.

A mandamus will be granted from the Supreme Court directing the judge of the district court to grant an appeal from a judgment on a rule authorizing an execution to issue against executors for a certain amount, if it be shown that the rule was made absolute, and an execution issued thereon for a larger amount than the judgment creditor was authorized to demand of them.

**A**PPPLICATION for a Writ of Mandamus. *G. Duplantier*, for relators.  
*Duvigneaud, J.*, respondent.

HOWELL, J. The relators ask for a mandamus to compel the Judge of the Second District Court for the parish of Orleans to grant them a suspensive appeal from a judgment on a rule authorizing an execution against them for three thousand and fifty-one dollars and ten cents in favor of one J. B. Massieu.

The judge justifies his refusal on the following grounds :

*First*—Because, in January, 1872, on motion of relators, they were ordered to retain in their hands the sum of twelve thousand dollars, and distribute the balance held by them as executors of Charles Massieu, deceased, as shown by their final account, among the several legatees *pro rata*.

*Second*—Because, when the rule of said J. B. Massieu for an execution came on for trial, the relators made no defense thereto, though duly cited.

*Third*—Because, in the argument for a new trial of said rule, counsel for relators claimed two credits, amounting to fourteen hundred dollars, to which counsel for J. B. Massieu assented, and offered to have the credit entered of record on the judgment, which entry was opposed by said executors, and hence not made in that form.

*Fourth*—Because said judgment for an execution personally against said executors became final, and execution issued thereon against them on the eleventh of June, 1872, for only the balance acknowledged by them to be due after allowing the said two credits, being all the credits ever claimed by them, and under the *feri facias* demand was made by the sheriff before this application for a mandamus.

*Fifth*—Because the original judgment in favor of said Massieu for the sum of eight thousand dollars was a legal confession, having been placed by said executors on their account, annexed to their petition, and on their own motion having been homologated—the sum of three thousand and fifty dollars and ten cents is the result of a calculation from that—after setting aside twelve thousand dollars to await the judgment on a claim in suit; and this sum is still further reduced by the two credits above mentioned. And as there is no difference between the amount claimed by the said J. B. Massieu and that admit-

*State ex rel. de Feriet and Monrose, Executors, v. The Judge of the Second District Court.*

ted by the executors to be due him, no appeal lies, and this application is made solely for delay.

It seems from the record that the application for a suspensive appeal from the judgment on the rule in question was made within the legal delay, and that the executors did claim that a less sum was due to the said J. B. Massieu than was allowed and ordered to be collected on execution. The plaintiff in the said rule having admitted that his rule was made absolute for a larger amount than was really due him, and having directed execution to issue for the amount thus admitted, it is possible that other errors exist, as contended by the relators, and that they have been condemned to pay more than said Massieu is entitled to demand of them as executors. They therefore have the right to have the action of the lower court in said proceedings reviewed on appeal. We can not consider the account, in connection with the subsequent proceedings, as a confession of judgment for the sum claimed in the rule taken by Massieu.

It is therefore ordered that the mandamus herein be made peremptory.

**No. 2856.—R. F. THEURER v. MRS. JOHN G. KNORR—MOORE & HILL, Intervenor.**

Mortgage creditors who appear as third opponents to claim the proceeds of the sale of the property under another mortgage can not be allowed to question the authority of the agent who gave the mortgage under which it was sold, for the reason that a party can not attack the validity of a sale and at the same time claim to be paid out of the proceeds.

**A** PPEAL from the Fourth District Court of the parish of Orleans. *Théard, J. R. J. & A. A. Ker*, for plaintiff and appellee. *Lacey & Butler*, for intervenors and appellants.

**TALIAFERRO, J.** The plaintiff instituted an executory proceeding against certain real estate in New Orleans on which the defendant had, through an attorney in fact, given a mortgage to secure a loan of \$9802 obtained by her from the plaintiff. Mrs. Knorr being an absentee, a curator *ad hoc* was appointed to represent her. After due proceedings had the mortgaged property was sold. Moore & Hill appeared by way of third opposition, claiming the proceeds of the sale as being creditors by special mortgage on the same property for the sum of \$10,647, and prayed to be so recognized, and that the funds be applied to the payment of their debt. On the trial of the case in the court below the opposition was dismissed. From this judgment the opponents appealed. These parties allege that the mortgage upon which the plaintiff proceeded to sell the property is a simulation gotten up in fraud to shield the property from their pursuit. They aver further that if the note and mortgage were given in good faith they are nevertheless with-

Theurer v. Mrs. John G. Knorr.

out force and effect against the opponents, because the agent and attorney in fact of Mrs. Knorr was not authorized by the letter of attorney to borrow money from the plaintiff and mortgage property to secure its re-payment; his authority to borrow money was restricted by the mandate to a loan or loans to be obtained from a bank or banks, or any moneyed institution.

The evidence introduced by the opponents signally fails to establish that the mortgage executed by the agent of Mrs. Knorr in favor of the plaintiff was a simulated and fraudulent act. The objection that the agent was without authority to contract with the plaintiff for a loan of money is devoid of force. This, if a defense, is one personal to the defendant, and can not by our jurisprudence be set up by an intervenor or third opponent. 6 N. S. 676; 21 An. 118; ib. 52; ib. 500.

It is well settled that a party can not attack the validity of a sale and at the same time claim to be paid out of the proceeds. 21 An. 262; 22 An. 135.

We think the judgment of the lower court correct.

Judgment affirmed.

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No. 4103. — STATE ex rel. J. GRAHAM, Auditor, v. JUDGE OF THE EIGHTH DISTRICT COURT, Parish of Orleans.

If an appeal has been granted and filed in the Supreme Court it can not afterward be withdrawn without the consent of the Supreme Court. The consent of the parties or the counsel does not divest the appellate court of jurisdiction over the case. The district court which granted the appeal is therefore divested of jurisdiction over the case until the appellate court has acted on the appeal. In case the court *a quo* assumes to act in the case after the appeal has been taken—before the Supreme Court has acted on the appeal—a writ of prohibition will issue on application of the appellant, restraining the judge *a quo* from further proceedings in the cause.

**A**PPPLICATION for Writ of Prohibition. *Hornor & Benedict*, for relator. *W. H. Cooley*, Judge of the Sixth District Court, presiding in the Eighth District Court, respondent.

HOWELL, J. The relator shows that he appealed suspensively from a judgment against him in the case of *The State ex rel. The Board of State Assessors v. James Graham, Auditor*, in the Eighth District Court for the parish of Orleans, and that after he had filed the transcript of appeal in this court proceedings were instituted against him in the lower court to dismiss the appeal and execute the judgment appealed from by him, and that in pursuance thereof he was imprisoned on the order of the judge *a quo* for contempt of court in not executing the said judgment. He therefore asked for a writ of prohibition.

The answer of the District Judge is, in substance, that the above named suit was tried contradictorily with the Attorney General, who

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State ex rel. Graham, Auditor, v. Judge of the Eighth District Court.

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alone has control of said case; that by act 21 of 1872, the Auditor is forbidden to appear or employ counsel to defend suits against him; that the lower court was without authority to grant him the appeal in question, and this court to entertain it, the Attorney General not having appealed, and having consented to dismiss the appeal granted to the Auditor.

Without expressing an opinion on the whole scope and the constitutionality of the act referred to, it is sufficient, in this case, to say that it does, in certain contingencies, authorize other counsel than the Attorney General to act for the Auditor and the State, and that from the documents before us, without objection, the counsel who acted in obtaining and bringing up the appeal in this instance appear to have been duly authorized to do so; and further, that when an appeal has once been taken the consent of the parties thereto is ineffectual to dismiss it without the action thereon of this court.

Under these circumstances the said appeal is still pending in this court, and the lower court is unquestionably exceeding its jurisdiction in attempting to execute the judgment.

It is therefore ordered that the prohibition herein be made perpetual.

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NO. 4091.—STATE OF LOUISIANA ex rel. PIERRE BAGUR v. THE JUDGE OF THE EIGHTH DISTRICT COURT FOR THE PARISH OF ORLEANS.

An appeal will lie from a judgment on the opposition of a third person to regulate the effect of the seizure in what relates to him, and a writ of mandamus will, in case of the refusal of the judge *a quo* to grant the appeal, issue compelling him to grant it.

**A**PPPLICATION for a Writ of Mandamus. *C. E. Schmidt*, for relator. *Dibble, J.*, respondent.

LUDELING, C. J. A sale of real estate having been made under an order of seizure and sale, Elizabeth G. Melone took a rule against Pierre Bagur, the purchaser, and the sheriff, to show cause why the proceeds of the sale should not be paid to her. An answer to this rule was made and a judgment was rendered in favor of the said Elizabeth G. Melone. Pierre Bagur applied for an appeal, which was refused, and he then obtained a writ of mandamus against the Judge of the Eighth District Court for the parish of Orleans. The answer of the judge is, in substance, that the order rendered, and from which an appeal is prayed for, is neither an interlocutory order, working an irreparable injury, nor a final judgment but a step in the execution of a former judgment. We do not so regard the matter. It is substantially a judgment on an opposition of a third person to regulate the effect of the seizure in what relates to him. C. P., article 395.

It is therefore ordered that the mandamus be made peremptory.

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State ex rel. Dubuclet, State Treasurer, v. The Judge of the Eighth District Court.

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NO. 4070.—STATE OF LOUISIANA ex rel. ANTOINE DUBUCLET, State Treasurer, v. THE JUDGE OF THE EIGHTH DISTRICT COURT FOR THE PARISH OF ORLEANS.

After an appeal has been granted, the court *a quo* is without jurisdiction to pass upon the question whether the appeal is a nullity or not, and any order made by the lower court in the case until the Supreme Court has passed upon the appeal is void, and a writ of prohibition will issue in such a case from the Supreme Court restraining the judge *a quo* from proceeding in the case until the appeal is passed upon.

**A**PPPLICATION for a Writ of Prohibition. *Semmes & Mott and Hays & New*, for relator. *Emerson*, Judge of the Third District Court, presiding in the Eighth District Court, respondent.

LUDELING, C. J. In the case of the State of Louisiana ex rel. Jacob Strauss v. Antoine Dubuclet, State Treasurer, an appeal was taken on the seventeenth of May, 1872, by the State of Louisiana, through the Attorney General, which was made returnable to the Supreme Court on the third Monday of May, 1872. On the eighteenth of May an appeal was taken by the State, through the agency of special counsel appointed by the Governor for that purpose, which was returnable on the first Monday of November, 1872. The Attorney General failed to file the transcript of appeal on the third Monday of May, but on the thirtieth of May, 1872, the special counsel appointed by the Governor as aforesaid filed the transcript of appeal, and on the thirty-first of May, 1872, hearing that the counsel for relator Strauss had obtained from the Clerk of the Supreme Court a certificate of non-filing of the transcript of appeal by the Attorney General within the time fixed for the return of his appeal, the special counsel for the State aforesaid applied to the Supreme Court for, and the said court granted, an order directing the Clerk of the Supreme Court to issue a certificate to the Clerk of the Eighth District Court for the parish of Orleans, certifying that the suspensive appeal taken on the eighteenth of May, 1872, returnable on the first Monday of November, 1872, was still pending and undetermined in the Supreme Court, and said certificate was issued and filed in said Eighth District Court, and thereupon H. C. Dibble, judge of said court, rescinded an order which had been made rendering the decree in favor of Strauss executory. Subsequently H. C. Dibble rescinded the order aforesaid, made by him, on the ground that he was recused in the case. Thereupon counsel for relator caused to be issued a copy of the original decree, and demanded execution thereof, but said Dubuclet refused to recognize said decree as executory, on the ground of the pendency of the suspensive appeal aforesaid, taken by the special counsel of the State, and returnable on the first Monday of November, 1872, and thereupon the counsel for the relator has moved to punish said Dubuclet for contempt, as appears by the rule taken against him. On application of Dubuclet, State Treasurer,

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State ex rel. Dubuclet, State Treasurer, v. The Judge of the Eighth District Court.

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a writ of prohibition was issued, returnable on the first Monday of November, 1872.

The answer of the Judge of the Eighth District Court aforesaid is that he was recused, and the Judge of the Third District Court rendered the order complained of.

The answer of the Judge of the Third District Court, sitting in the place of the Judge of the Eighth District Court, is that, in his opinion, the order for the appeal granted on the seventeenth of May was an absolute nullity, as that court was divested of jurisdiction by granting the first appeal, and that he had no notice of the order of this court directing the clerk thereof to issue the certificate above mentioned.

We do not consider the reasons given for assuming jurisdiction satisfactory. An appeal had been taken and was pending in this court, and no other court could pass upon the validity of that appeal.

It is therefore ordered and adjudged that the prohibition be made perpetual.

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No. 4099.—STATE ex rel. A. M. HOLBROOK v. JUDGE OF THE EIGHTH DISTRICT COURT FOR THE PARISH OF ORLEANS.

A judgment for alimony for two hundred and fifty dollars per month, pending the suit for divorce, is appealable and can not be defeated by a *remititur* on the part of the judgment creditor so that it shall not exceed five hundred dollars, and on application to the Supreme Court the judge *a quo* will be compelled by mandamus to grant an appeal from such a judgment, notwithstanding the *remititur*.

**A**PPPLICATION for Writ of Mandamus. *Semmes & Mott* and *P. H. Morgan*, for relator. *H. C. Dibble, J.*, respondent.

HOWELL, J. This is a proceeding by mandamus to obtain a suspensive appeal from a judgment on a rule for alimony at five hundred dollars per month from twentieth of June, 1872, in the suit of *J. B. Holbrook v. A. M. Holbrook*, No. 7769, in the Eighth District Court for the parish of Orleans.

The judge answers that the judgment is not appealable, because a *remititur* was entered by the plaintiff for all her claim, which exceeded five hundred dollars.

The claim in the rule, dated ninth of September, 1872, was for "five hundred dollars per month alimony during the pendency of this suit, dating and to commence from the date of the institution of this suit, to wit, the twentieth day of June, 1872." On the trial of the rule on the eighteenth of September, 1872, judgment was rendered as follows:

"It is ordered and decreed that the rule taken herein by plaintiff for alimony be made absolute so far only as to allow the plaintiff alimony at the rate of two hundred and fifty dollars per month from the twentieth day of June, 1872, to be paid by defendant to plaintiff."

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State ex rel. Holbrook v. Judge of the Eighth District Court.

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monthly. And considering the *remittitur* filed by plaintiff, it is further ordered that execution do issue against the defendant Alva M. Holbrook for the amount now due, to wit, the sum of five hundred dollars."

The *remittitur*, dated sixteenth of September, 1872, two days prior to the judgment, appears to be in the following form: "On motion of John B. Howard and Edward Phillips, attorneys for plaintiff, it is ordered that a *remittitur* be entered on the claim for alimony filed herein by plaintiff for all claimed by her in this suit exceeding five hundred dollars, which may be due on the rendition of the judgment in this rule for alimony from the twentieth day of June, 1872."

From the terms of the rule and judgment it is clear that the demand was for more than five hundred dollars, and that the defendant was condemned on the eighteenth of September to pay more than that amount—two hundred and fifty dollars per month from the twentieth day of June, 1872, to be paid monthly by the defendant during the pendency of the suit; and unless the *remittitur* has reduced the demand for alimony during the pendency of the suit to five hundred dollars only, the defendant is entitled to an appeal. But no such construction seems to have been put on it or can properly be put on it. It only remits the excess over five hundred dollars due at the date of the judgment, and does not affect the decree for the monthly alimony at two hundred and fifty dollars per month thereafter and during the pendency of this suit, or the obligation of the defendant to pay such alimony during such period.

It is therefore ordered that the mandamus herein be made peremptory.

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#### NO. 2751.—J. LANABERE v. CITY OF NEW ORLEANS.

A judgment which has been given for damages for a less amount than was claimed in the petition will not be amended on appeal at the request of the plaintiff and appellee, where the evidence in the record is not sufficiently full to authorize the increase.

**A** PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. E. Filleul*, for plaintiff and appellee. *J. E. Beckwith*, City Attorney, for appellant.

HOWELL, J. The plaintiff herein sued for \$4000, amount of damages caused by a mob on the night of the twenty-sixth of October, 1868, and from a judgment for \$2500 the city appealed. The plaintiff has asked that the judgment be increased to the amount claimed. The evidence, however, is not sufficiently full and specific to require any disturbance of the judgment rendered by the District Judge, who had the parties and witnesses before him.

Judgment affirmed.



## No. 3177.—LUCIEN BLAND et als. v. EDWARD LLOYD et als.

A tutor has the right to purchase at the sale of the minors' property which he is administering, if he be the surviving partner in community, or an heir or a legatee of the deceased.

In a suit by the heirs to recover the property of their ancestor, which has been sold by the tutor, on the allegation that the sale made by the tutor through the agency of a third person is a nullity, parol evidence is admissible to show that the estate was in debt, and that the purchase money went to discharge the debts of the estate, and that the balance was divided among the heirs of age.

Where property of an estate which is largely in debt, represented by a tutor, has been, under the advice of a family meeting, sold at judicial sale, and the proceeds of the sale have been applied to the payment of the debts, and the balance has been divided among the heirs in pursuance to the advice and directions of a family meeting, the sale is valid and binding upon the heirs. In such a case the heirs of age having taken the residue of the price of the sale and divided it among themselves, before they can institute and prosecute a suit for the recovery of the property on the ground that the sale was a nullity, must return or offer to return the price they have taken or which inured to their benefit—they not being permitted to hold on to the price and at the same time prosecute a suit for the recovery of the property itself.

**A**PPEAL from the Thirteenth Judicial District Court, parish of Tensas. *Hough, J. Julius Aroni and W. B. Spencer*, for plaintiffs and appellees. *Thomas P. Farrar and Sparrow & Montgomery*, for defendants and appellants.

LUDELING, C. J. This is a petitory action. The plaintiffs Lucien Bland and Ella Bland allege that they are children of Emeline Bland, deceased, and Maxwell W. Bland; that their mother left six children, viz: George and James S. Douglass, issue of her first marriage, and Lucien, Ella, Archibald and Richard, issue of her marriage with Maxwell W. Bland; that the plantation of their said mother, called "River Plantation," comprising fourteen hundred and forty-two and eighty-one-hundredths acres, was divided between the children of her first marriage and those of her second marriage, and that the Bland children received the "rear half," containing seven hundred and twenty-one and forty-one-hundredths acres. They allege further, that on the fourteenth day of October, 1859, while they were yet minors, the said Maxwell W. Bland, their father and tutor, applied to the court for an order of sale; that the order was granted, and that the sheriff proceeded to sell the said property in accordance with the terms fixed by a family meeting, and that at the sale J. J. Person apparently became the purchaser, although, in fact, their said tutor Maxwell W. Bland was the purchaser, contrary to law. They allege that the sale was a nullity, and pray to be declared the owners of twenty-three-fortieths thereof, and that the sale to J. J. Person, and the sale to Lloyd be annulled and set aside. Subsequently they filed an amended petition in which they aver that Richard Bland has died, and that Archibald Bland desires to become a party plaintiff, and they pray that their half sisters and brothers, issue of the marriage of their father with Mary Clark be cited through a *curator ad hoc*, and they pray that James S.

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Douglass, through his assignee Rollins, George Douglass and Archibald Bland be made parties, plaintiffs.

There was judgment in favor of Lucien Bland, Ella Bland, George and James S. Douglass, for the use of A. Rollins for an undivided interest of six hundred and thirty-three acres of said rear half of River Plantation.

From this judgment the defendant has appealed. On the trial the defendant offered to prove that Maxwell W. Bland placed large and valuable improvements on the plantation during the marriage to show he was interested in the community, which was objected to on the grounds that it was inadmissible under the pleadings, and that defendant had admitted in his answer that M. W. Bland had no interest in the land in controversy; *second*, that the issue in this case was title to real estate, and the evidence was irrelevant: and *third*, that it was an attempt to prove title by parol. We think the objections not tenable. The object of the proof was to dispose of the allegation that the tutor could not buy at the sale, if it should be held that he had bought. If he was interested in the community or in the succession he had a right to purchase at the sale. The law authorizes tutors to purchase at the sale of the effects of the deceased, whose estate he may represent, when he is the surviving partner in community or an heir or legatee of the deceased. Revised Statutes, p. 9, section 12.

He administered the estate of his wife as tutor, as the creditors did not demand the appointment of an administrator. 2 An. 462; 4 An. 561; 10 An. 534; 14 An. 641, 567; 7 R. 24.

Another bill was taken to the reception of the testimony of James S. Douglass, to prove that Maxwell W. Bland had admitted to him in a private conversation many years before, that the estate was not in debt, on the ground that it was hearsay. We think the objection goes to the *effect* rather than to the admissibility of the evidence. Bland is made a party to this suit, and his admissions, as a general rule, may be given in evidence; but it is well settled that the loose declarations of a party, since dead, made in conversations, is the weakest kind of evidence and is entitled to little or no weight. Pagaud v. Anbesson, 10 La. 355; Stancil v. Gilmore, 6 An. 763; 2 R. 299; 7 R. 111; 6 An. 113, 146; 8 An. 277; 10 An. 279; 14 An. 274.

The plaintiff took a bill of exceptions to the reception of the testimony of Person, on the grounds that Lloyd, the defendant, can not dispute the title of his vendor, and he "can not dispute, vary or contradict his admissions in the authentic act" evidencing his purchase; that plaintiffs' title cannot be destroyed nor defendants' established by parol proof, nor by proof of fraud; and that as the law declares a purchase of property belonging to his ward by a tutor, through the agency of a third person or otherwise a nullity, proof that the price

enured to the benefit of the minors can not be admitted. The judge *a quo* correctly overruled the objections.

The objections were not applicable to the testimony offered. The testimony was introduced to prove that the estate of Mrs. Bland was in debt; that the price of the property sold went to discharge the debt of the estate and the surplus was divided among the heirs of age and the minors through the agency of their natural tutor, and to disprove the allegation that Person was the agent or representative of Bland, the tutor at the succession sale. 10 An. 784; 4 An. 555; 5 An. 248; 14 An. 710. The evidence proves the following facts:

In November, 1858, Maxwell W. Bland, tutor, petitioned for the convocation of a family meeting to advise as to the sale of the "rear half of the river plantation." The meeting was convoked; it advised the sale and fixed the terms thereof. In March, 1859, Lloyd, Sr., visited the said plantation and agreed to buy it at \$70 50 per acre. Bland obligated himself in a penal bond to make him a perfect title and to guarantee the same. The "River plantation" had been previously divided between the heirs—the two Douglass children, who were of age, taking the front and the Bland children taking the rear half thereof. In October Bland obtained an order for the sale of the rear half, and in November, after due advertisement, the property was adjudicated by the sheriff to J. J. Person for the appraised value of the property and on the terms fixed by the family meeting. It appears that at this time the estate was indebted to J. J. Person & Co. in the sum of \$90,000. J. J. Person swears that "Mrs. Bland and her heirs were indebted to me individually, about the first of January, 1860, \$67,098 10, and to J. J. Person & Co., New Orleans, in an amount to make about \$90,000." Person paid the cash installment and gave his two notes to the tutor, as appears from the *procès verbal* of the sheriff. Bland then procured an order of court on the advice and recommendation of a family meeting to authorize him to permit Person to cash his two notes, which appears to have been done.

In December Bland executed a power of attorney to Person "to sell the whole or any part of 'River Place,' and within a few days thereafter Person sold to Lloyd the whole 'River Place.'"

In the act of sale, it is declared that "Maxwell W. Bland, of Washington county, Mississippi, is the owner of said land, but placed the same in his name for convenience, and he (Person), acting in the capacity of agent and attorney in fact of said Bland by virtue of a power of attorney, etc., hereby promises and binds his said constituent to warrant and forever defend said land," etc. Person's wife joins in the act and makes the usual renunciations, and Person signs the act for himself and for Bland. Person, in his testimony, says that "he does not know and does not suppose that Bland had any title to the land;"

but "he warranted to give Lloyd, Sr., his (Bland's) warranty, as I told him that my deed was only a quit claim deed."

From a careful analysis of the evidence in this case we have come to the conclusion that Maxwell W. Bland was not the purchaser at the sheriff's sale, but that J. J. Person was the purchaser; that he bought with the view to secure the payment of his debt and to aid M. W. Bland in carrying out his agreement to make a title to Lloyd, Sr., and give him a warranty title.

That no fraud was intended and no injury resulted to the succession or heirs from the sale; that Lloyd bought in good faith and paid a very high price for the property, to wit, \$97,823 57 in cash; that \$90,000 of this amount was applied to the payment of the debts of Mrs. Emeline Bland and the heirs, and the remainder was divided, one-half to George and J. S. Douglass, and the other half to the tutor of the minors; but whether all the debts were created for the benefit of the estate, after Mrs. Bland's death or not, is unimportant. The price received enured to the benefit of the heirs, and they can not enrich themselves at the expense of the *bona fide* purchaser. In equity and under the law the plaintiffs can not sue for the nullity or rescission of this sale without first offering to restore the price paid by the defendant. C. C. art. 1902; 13 An. 213; 21 An. 383; 24 An. Barelli v. Gauche.

We are further satisfied that Bland, the tutor, was a legatee under the will of Mrs. Bland, and the surviving partner of the community, and that he was interested in the succession and in the community, and that he might therefore have lawfully purchased at the succession sale had he done so.

It will be observed that not only the rear half of the plantation was sold and delivered to Lloyd, but that the front half also was sold by Person, under the power of attorney from Bland. This front half had been up to that time in possession of the Douglass heirs, who were majors. How did Lloyd get possession without their consent, and why have they slept so long on their rights while a trespasser was enjoying the fruits of their property? Is it not fair to presume that the division of the property had been made only for the convenience of the heirs, and that when an opportunity was offered to sell the whole plantation for a large price they had consented to permit Bland, their stepfather, to sell the front half for the same purpose that Person alleged the title (which was in himself) to be in Bland, to wit, that he might make Lloyd a title with his warranty, in conformity to his penal obligation. Be this as it may, the plaintiffs have failed to establish the nullity of the sale to Lloyd. The sale to Person, which is attacked collaterally in this suit, is not shown to have been made to Bland, even if the right to attack the sale in this manner and without making Person, the vendee, a party, be conceded.

They must fail for the further reason that they have not offered to return the price which inured to their benefit.

It is therefore ordered that the judgment of the lower court be annulled and that there be judgment rejecting the plaintiffs' demands, with costs of both courts.

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TALIAFERRO, J., *dissenting*. I do not concur in the opinion of the majority of the court for the reason that, as I understand the evidence, the sale of a large and valuable estate belonging to minors of tender years, and derived to them by inheritance from their mother, whose estate at her decease is not shown to have owed a dollar, was sold by their tutor in pursuance of a private agreement made by him with Lloyd. It is clear to me that the tutor has in this instance by using the machinery of the law, which is intended to guard and protect the interests of minors, endeavored to divest his wards of their rights to the property in question. He first enters into an unconstitutional act of sale of the property to Lloyd, obligating himself to make a title free from all encumbrances, has it sold, buys it himself through a party, interposed then according to and in fulfillment of his agreement with the purchaser, makes him a title with full warranty. This act he did in contravention of a prohibitory law. Article 337 of the Civil Code is express, that "the tutor can not either personally or by means of a third person purchase, lease or hire the property of the minor or accept the assignment of any right or claim against his ward." Lloyd dealt with a party not having the right to sell, and therefore dealt with him at his peril. Bland, the tutor, had no right or interest in the property of the minors which could possibly give him any right to bid for or purchase their property. In order to bring more prominently into view the facts of this case, I will advert to some proceedings which had been taken previous to this contract between Bland and Lloyd.

After the death of Mrs. Bland, which occurred in 1849, an order of the district court was rendered for a division in kind of the tract of land, containing fourteen hundred and sixty acres, in order to effect a partition between the present plaintiffs and children of Mrs. Bland by a previous marriage. The land thus falling to the plaintiffs was theirs by inheritance from their mother, and it was so decreed. In November, 1858, Bland, as natural tutor of his children, provoked the assembling of a family meeting for the purpose, it seems, to advise the sale of their land. The meeting advised the sale and recommended the investment of the proceeds in other lands. Their action was approved and homologated by the court, but no order was then rendered. In October, 1859, however, in order to carry out his contract with Lloyd,

entered into, as we have seen in March of that year, Bland applied for and obtained an order for the sale which was rendered according to the terms prescribed by the family meeting, to wit: One-third in cash, and the remainder in one and two years. The property was sold on the nineteenth of November, 1859, and Person, by attorney in fact, became the purchaser. In the deed of the sheriff Bland acknowledged to have received the money and the notes. Two days afterward, on the twenty-first of November, a petition, at the instance of Bland, was presented to the court, representing that Person wished to pay the two notes in cash, and praying that a family meeting be convoked to authorize the tutor to accept the proposition. The meeting was held on the twenty-fourth, and the authorization prayed for was granted, and the order rendered accordingly. On the twenty-seventh of December, 1859, before a notary in New Orleans, Bland executed a power of attorney authorizing Person as his agent to convey title to Lloyd of the land in question, and on the second of January, 1860, Person in the capacity of Bland's agent and attorney in fact by a notarial act made the deed to Lloyd. In this act of sale Person, who figured as the purchaser of the land on the nineteenth of November preceding made the following declaration:

"And the said James J. Person declares that Maxwell W. Bland of Washington county, Mississippi, is the owner of said land, but placed the same in his name for convenience, and he acting in the capacity of agent and attorney in fact of said Bland, by virtue of a power of attorney passed before the undersigned notary on the twenty-seventh of December, 1859, hereby promises and binds his said constituent to warrant and forever defend said lands against all legal claims and demands whatever, and guarantees this title to the same in every respect."

This act of sale was accepted and signed by Lloyd. Lloyd sets up in his answer that if there were fraud and collusion between Bland and Person that he was no party to it, and ought not to suffer on that account. He further charges in his answer that at and prior to the date of said conveyance to Person the said succession and heirs of Emeline W. Bland, plaintiff's mother, were for and on account of said property very largely indebted to said Person, who had been for a series of years the factor and commission merchant for said succession; that the said Person applied the proceeds of the property to the payment of that indebtedness of the plaintiffs, a small portion being used by Bland to carry on the Buck Ridge plantation, the property of the plaintiffs. Lloyd accepted a deed of conveyance from Bland which made known to him that Bland and not Person was the purchaser of the property, and therefore that he purchased at his peril. The allegation that Mrs. Bland's succession was burdened with debt, is not

made out by the evidence. Neither is it shown that the indebtedness alleged was contracted on account of the minors. Mrs. Bland died in 1849; the dealings with Person as factor and merchant did not commence until 1851 or 1852, and probably later. Person testified as a witness that the plantation was sold in 1860 to pay the debts of Mrs. Bland and heirs and to enable Bland and the children of the first marriage to divide the property. In the petition of Bland for the family meeting that was convened on the thirtieth November, 1858, and which authorized the sale, there is not a word about the indebtedness either of Mrs. Bland's succession or of the minors. No necessity was declared to exist for a sale of a valuable and productive plantation. The act was put on the ground of expediency. The question presented for the consideration of the family meeting was whether under the circumstances it would not be to the interest of the minors that the land should be sold and the proceeds reinvested in other lands. There is no exhibition of the revenues of the plantation and the expenses of the minors showing that the expenses necessarily incurred by the tutorship exceeded the revenues of the minors.

The heavy indebtedness pretended to exist against the succession of Mrs. Bland and held up as a justification of the sale of the minors' estate is certainly not shown. On the contrary, all the facts in the record tend to satisfy me that this indebtedness was created by the tutor himself upon the credit of his children's estate, to subserve his own purpose, and that little or none of it inured to the benefit of the minors. It surpasses belief that an estate of the productive capacities of that falling to these minors could not support them, but in the course of less than ten years should fall in debt ninety thousand dollars. Even had these been debts against Mrs. Bland's succession (and none whatever are shown), they should have been extinguished and large net revenues preserved by their tutor, if he had discharged his duties. As to the pretensions of the defendant that he was an innocent purchaser and should be protected, I rather think the authority of justice more properly invoked by the plaintiffs to shield them from acts against which they were defenseless and which were concocted and carried out by the one to whom mainly the law confided their rights. I think the judgment of the lower court should be affirmed.

WYLY, J. I concur in this dissenting opinion.

Rehearing refused.

## No. 4092.—STATE ex rel. DURAPAN v. JUDGE OF THE FOURTH JUDICIAL DISTRICT COURT.

The clerk of the district court who has been suspended from exercising the functions of his office by the judge of the court has the right to have the legality of such order reviewed on appeal, and a mandamus will issue on application of the clerk, commanding the judge to grant an appeal.

**A**PPPLICATION for a Writ of Mandamus. *J. D. Augustin*, for relator. *R. Beauvais*, for respondent.

LUDELING, C. J. The relator, according to the sworn allegations of his petition, was suspended from exercising the functions of the office of Clerk of the Fourth District Court of the parish of St. Charles by the judge thereof, under section 1955 of the Revised Statutes.

The only question presented for decision now is, whether the relator has a right to appeal from that judgment of suspension? The relator alleged in his answer that the law under which the judge was proceeding was unconstitutional. We think it is clear that he has a right to have an appeal to decide that question. The defendant has failed to file an answer to the rule *nisi*.

It is therefore ordered that the mandamus be made peremptory.

## No. 4358.—E. B. MARMILLON v. E. R. ARCHINARD.

The builder's lien and privilege allowed by law on the building erected by the contractor only dates and takes rank from the day it is recorded in the office of the Recorder of Mortgages. The recording of a detailed statement of the amount due, attested under the oath of the builder, only gives him a privilege on the building from and after it is recorded. It does not date back to the time of the contract for the erection of the building. Other mortgages or privileges of prior date of record will therefore take precedence over such a privilege in the distribution among the creditors of the proceeds of the sale of the property.

**A**PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. A. L. Tissot*, for plaintiff and appellee. *A. Robert and Albert Voorhies*, for intervenor appellee. *Semmes & Mott* and *M. M. Cohen*, for intervenor and appellant.

TALIAFERRO, J. A contest is here presented between several creditors claiming to be paid by priority and preference out of the proceeds of sale of a lot of ground and the buildings upon it in Bienville street, New Orleans. The claims of the several parties seem to stand as follows:

Marmillon, the plaintiff, and one Goldthwaite are holders each of a note for \$3,333 33, which were given by Archinard, the defendant, for the balance due of the price he stipulated to pay for the lot of ground in question with the buildings upon it when he purchased the property on the twenty-seventh of September, 1866. These notes are secured by mortgage and vendor's privilege of the same date. On fifteenth of



August, 1870, Archinard executed three promissory notes of \$3,773 71 each in favor of Jamison, a builder, who had, during the years 1868 and 1869, erected for him on the lot referred to a new and costly edifice. One of these notes passed into the hands of Nicholson, one of the contestants, and the other two are brought into the controversy by the Crescent Mutual Insurance Company. These parties have concurrent claims, for which they set up the privilege accorded to architects and others by the article 2772 [2743] of the Civil Code. These notes are also secured by mortgage upon the property. The Merchants' Mutual Insurance Company as holder of two notes of the defendant, one for \$1000 the other for \$2000, claims a right to participate in the proceeds, asserting a mortgage on the property, executed on the twentieth of November, 1868.

Upon the pleadings and evidence presented the court *a qua* decreed a distribution of the proceeds of the property on the following basis: After discharging the costs of the proceedings the concurrent claims of the plaintiff and Goldthwaite to be first paid. Next that the Merchants' Mutual Insurance Company be paid its claim, and that the remainder of the proceeds, if there be any, be paid over concurrently and pro rata to Nicholson and the Crescent Mutual Insurance Company. The last named parties appealed.

We find from the record that the act of mortgage from Archinard to Jamison on the fifteenth of August, 1870, to secure the payment of the three notes of \$3,773 71, on which was based the architect's privilege, contains the following clause: "And here the said Archinard declared and acknowledged that the three notes issued and furnished by him in virtue of this act are given in lieu of five other notes drawn and endorsed by him, dated on the first day of September, 1869, four of which being for two thousand dollars each, made payable in twelve, twenty-four, thirty, and thirty-six months after date, and the other for three thousand and twenty-one dollars and thirty-one cents, made payable forty-two months after date, which notes represent the balance due by him the said Archinard to the same Jamison for erecting certain buildings on the said described property, and are secured by the privilege hereinbefore referred to, and the said three notes now issued and furnished by the said Archinard in virtue of this act being for the same identical indebtedness represented by the said five notes above described, and which are hereunto annexed, it is hereby agreed by and between the said parties that the said mentioned privilege shall remain in full force and effect, and shall guarantee the payment of the said last mentioned three notes; the whole without any novation of the said original indebtedness."

The original five notes here specified, and which are declared to be "hereunto annexed," it seems, have not been produced and shown.

They make in the aggregate, the amount of a detailed statement of the labor furnished and the building material supplied by Jamison in the construction of the new building upon the lot in Bienville street, purchased by Archinard from Eliza Evans. This detailed statement, sworn to by Jamison, was recorded in the mortgage office on the twenty-eighth of September, 1869. He testifies that he began the work in July or August, 1868, and furnished it in about one year; that the house was finished when he made the affidavit to the detailed statement of labor and materials furnished; and the affidavit is dated September 27, 1869.

Article 2772 of the Civil Code declares that "the undertaker has a privilege for the payment of his labor, on the building or other work which he may have constructed," and article 3272 provides that "architects, undertakers, etc., preserve their privileges only in so far as they have recorded with the recorder of mortgages in the parish where the property is situated the act containing the bargains they have made, or a detailed statement of the amount due attested under the oath of the party doing or having the work done, or acknowledgment of what is due to them by the debtor."

The article 3273 declares that "privileges are valid against third persons from the date of the recording of the act or evidence of indebtedness as provided by law." And the succeeding article provides that "no privilege shall have effect against third persons, unless recorded in the manner required by law in the parish where the property to be affected is situated. It shall confer no preference on the creditor who holds it over creditors who have acquired a mortgage, unless the act or other evidence of the debt is recorded on the day that the contract was entered into."

No written agreement, it seems, was entered into by Archinard and Jamison as to the cost of the building before it was commenced, and no contract in writing entered into in regard to the work. The purport of the several articles referred to applied to the facts of this case appears to authorize the conclusion that the recording of the detailed statement on the twenty-eighth of September, 1869, can have no bearing upon the property anterior to the twentieth of November, 1868, the date of the recording of the mortgage of the Merchants' Insurance Company. The recording of the detailed statement did not carry back the privilege to the time Jamison began the work. Neither did the declaration and recital in the act of mortgage from Archinard to Jamison on the fifteenth of August, 1870, which we have adverted to, have that effect. Privileges are *stricto juris*. The failure on the part of Jamison to have his agreement and contract with Archinard relative to the building he was to construct reduced to writing and recorded as required by law was fatal to his claim to a privilege adverse to the

vendor's lien and mortgage, and the mortgage of the Merchants' Insurance Company. His own mortgage can only take rank according to the time of its recordation, and it is the junior mortgage on the property.

It is contended by the opponent's setting up the prior mortgage and vendor's lien, that by taking notes in payment of the price of the work and materials as set out in the detailed statement, and again exchanging them for the notes executed by Archinard in August, 1870, a novation of the debt took place which destroyed the privilege of Jami-son if he ever had one. We think it clear that novation took place and that it had the effect contended for, of destroying the privilege asserted, if there ever existed one. With the views expressed we think the decree of the lower court correct.

Judgment affirmed.

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No. 2564.—*L. SURGI v. JEANNETTE MATTHEWS et al.*

The acts of the General Assembly of 1867 and 1868 providing for the construction and the maintaining of the levees on the Mississippi river in the State of Louisiana superseded the former laws imposing upon the riparian proprietors the burden of constructing such levees at their own cost, and the parishes were thereafter without the right or authority by ordinance of the police jury or otherwise, to bind the lands of any front proprietor for the construction of any levee on the bank of the river.

**A** PPEAL from the Seventh Judicial District Court, parish of Pointe Coupée. *Miller, J. Farrar & Montgomery*, for plaintiff and appellant. *Wickliffe & Fisher* and *Charles H. Hewes*, for defendant and appellee.

**TALIAFERRO, J.** The plaintiff sets forth, that by an adjudication of a levee contract made under the authority of the parish of Pointe Coupée on the sixteenth of October, 1867, he became the undertaker of the work let out, which was the building of a levee in front of the tract of land belonging to the defendant on the Bayou Grosse Tete; that he performed the work in accordance with the terms proposed for the sum of \$11,238, his being the lowest bid made at public sale; that by law he has a privilege upon the land on which the levee was built to secure the payment for the work; and that both the proprietor of the land and the police jury of the parish of Pointe Coupée refusing to pay him the sum aforesaid or any part thereof, as they are bound by law to do under special contract with him, he brings this suit and prays judgment in the alternative against either of the defendants with privilege on the land; that the police jury be condemned *in solido* with the other defendant to pay the said sum of \$11,238 and be ordered to levy a tax on the parish aforesaid to pay the debt and costs.

The defendant (Mrs. Matthews) excepted to the form of action

adopted by the plaintiff, because he alleged separate and distinct causes of action against distinct defendants who are illegally joined in the action, for the reason that there is no priority of contract between them, and that the allegations are vague and indefinite, and which, if true, go to show that plaintiff has no claim against her. The court sustained the exception and ordered a non suit entered as to the police jury. We think this ruling correct.

The remaining defendant answered, denying all the allegations of the petition and averring all the acts and proceedings of every kind alleged to have been done and taken by the police jury and its officers in the premises are null and void for the reasons that said police jury was without power or authority to pass the pretended ordinance under which the plaintiff claims to exercise the right to render the defendant's land liable for the payment of the work he alleges he has performed.

Judgment was rendered in favor of the defendant, reserving to the plaintiff the right of presenting his claim against the Board of Public Works, or against any corporation or any person other than the defendant. From this judgment the plaintiff has appealed.

In September, 1867, the police jury of the parish of Pointe Coupée assembled in pursuance of an order rendered by General Sheridan, under date of thirtieth of August, 1867. A committee was appointed, who reported that the levees in that parish could not be built or repaired by taxation or by imposing the burden upon riparian proprietors, owing to the impoverished condition of the people, overwhelmed as they were with debt. That the front proprietors, if required at their own cost to build the levees, would be compelled to abandon their lands to the parish. The report was introduced in evidence by the defendant to show that the true intent and meaning of the ordinance of September, 1867, is in consonance with the spirit of the report; that it is only by a perversion of the spirit and letter that it is construed, so as to impose upon the defendant the ruinous obligation of performing a work, the cost of which would exceed the value of her plantation. At the next succeeding term of the police jury, in January, 1868, this ordinance was repealed. It was only a few days after the plaintiff commenced his work that the ordinance under which the contract was let was repealed. He continued, however, to prosecute the work, and it was received by the inspector appointed to superintend the building of the levee.

In a case recently decided by this court (the case of the Police Jury parish of Jefferson *v. J. J. Tardos*), we had occasion to examine at some length the question whether the acts of the Legislature of 1867 and 1868 suspended the previous laws imposing upon riparian proprietors the burden of constructing levees at their own cost along the margin of the Mississippi in front of their lands. The conclusion reached was

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that they did, and that the order No. 130 of General Sheridan, dated August 30, 1867, was in harmony with these acts. The case now before us is one which presents a much stronger claim for relief under the laws now in force on the subject of levee building than the one of Police Jury of Jefferson v. J. J. Tardos. And for the reasons stated in that decision we sustain the decision of the lower court in the present case.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed, with costs in both courts.

### No. 3016.—A. WEBER v. C. A. GORSUCH et als.

The third section of the act of 1869 which authorizes the sale of property seized under execution to be sold without appraisalment when it appears that, in the event any party refuses to qualify as appraiser under the provisions of this act, then the property shall be sold without any appraisalment whatever, is constitutional.

There is no lesion in judicial sales.

A second mortgage creditor who seeks to annul a judicial sale made at the suit of first mortgage creditors, on the allegation of collusion between the judgment debtor, the sheriff and the purchaser, can not be permitted to prove that the debtor was at the time deficient in mental capacity, and was therefore incapable of making a contract.

**A** PPEAL from the Second Judicial District Court, parish of Jefferson. *Pardee, J. B. C. Ellott*, for plaintiff and appellant. *Brickell & Marr, Breaux & Fenner* and *N. Commandeur* and *W. T. Scott*, for appellees.

**HOWELL, J.** Plaintiff, as second mortgage creditor of one Thomas Clark, sues to restrain the completion of a sheriff's sale of property sold by the sheriff of Jefferson parish under three executions issued from the court of the sixth justice of the peace of Orleans, and to annul the said sale with damages on the grounds:

*First*—Of collusion and fraudulent combination between Gorsuch, Clark, the sheriff and Hugh Murphy, the adjudicator, to the prejudice of plaintiff and with a knowledge of the nullities of the proceedings under which the sale was made by the sheriff.

*Second*—Want of appraisalment of the property.

*Third*—Nullity of the judgments and proceedings under which the sale was made.

*Fourth*—The sale was made for less than one-sixth of the real value of the property.

Gorsuch, Murphy and the sheriff plead the general issue, and Clark having died after default was entered, his administrator admits the allegations of the petition, except the charge of fraud and collusion, and sets up the mental imbecility of Clark at the time of the seizure and sale by the sheriff and for a year previous thereto to the knowledge of his co-defendants, the nullity of the proceedings in the several suits of Gorsuch v. Clark and the excessiveness of the seizure,

From a judgment dissolving the injunction with damages, the plaintiff prosecutes this appeal. The administrator, by answer, joins in the appeal, but has furnished us no brief.

*First*—There is no evidence of fraud and collusion.

*Second*—The sale without appraisalment was authorized by the third section of the act of 1869 (p. 18), which provides that "in the event any party should neglect or refuse to qualify (as appraiser) under the provisions of this act, then the property to be sold shall be sold without any appraisalment whatever."

The constitutionality of this act is assailed on the grounds that its title is insufficient and its provisions impair the obligation of plaintiff's contract of mortgage.

The title, in our opinion, sufficiently indicates the object of the act : "To regulate the appraisements of property under seizure or of succession in the parishes of Orleans and Jefferson." The legal regulation of the appraisalment of property to be sold under execution may appropriately involve the dispensing with an appraisalment under certain circumstances, as is done by this act.

We can not assent to the proposition of plaintiff's counsel that the enactment of this regulation subsequent to the date of plaintiff's mortgage is a violation of the constitution, which prohibits the passage of a law impairing the obligations of contracts. It applies only to the remedy for the enforcement of obligations; and the appraisalment is established in the interest of the debtor and may be waived by him without consulting other creditors than the seizing creditor. The second mortgage creditor can protect himself by making the property bring its real value.

*Third*—We can discover no such defects as to render null the judgments of the justice of the peace and the proceedings under them. The apparent discrepancy in the number of the court is explained by the statute passed between the date of instituting the suits and that of issuing the executions, changing the sixth to the seventh justice of the peace.

*Fourth*—There is no lesion in judicial sales, and there is no allegation nor proof that the sale was so conducted as to deprive plaintiff of the right to attend and bid on the property.

We will remark that the plaintiff can not complain that he was not permitted to prove the mental imbecility of Clark, as he not only did not make the necessary allegation, but such allegation is inconsistent with his charge of collusion on the part of Clark to injure him. The administrator is not urging any such complaint before us, and besides we think the ruling of the lower judge on this point was correct.

Judgment affirmed.

## No. 3968.—JAMES B. LEWIS v. MILDRED D. SMITH.

A citation served upon a person other than the defendant, who is only transiently at the domicile of the defendant and does not reside there, is fatal, and a judgment rendered thereon is absolutely void.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. O. T. Bemiss*, for plaintiff and appellee. *Labatt & Aroni*, for defendant and appellant.

HOWE, J. This is a suit to annul a judgment upon the ground, among others, that no citation or notice of suit or claim has ever been served upon the plaintiff. The return of the sheriff in the suit of *Smith v. Lewis et al*, in which the judgment complained of was rendered, recites that the copy of citation and petition was served on Lewis, by leaving the same at his domicile on Camp street in the hands of Mr. R. Fischer, a person apparently over the age of fourteen years, living and residing at said domicile, and whose name and other facts connected with the service were learned by interrogating said Fischer, etc.

On the other hand it was admitted on the trial of this cause that the witness R. Fischer, if present, would testify that at the time of this service he was not residing in the house where it was made but was only transiently there, "believes a desk where his brother was bookkeeper."

The evidence thus taken by way of admission was objected to on the ground that the petition in this action of nullity contains no allegation authorizing the rejection of such evidence. The objection seems to be made in error. The quotation made above from the petition is an averment that citation was never served on the plaintiff Lewis, either personally or in the constructive manner attempted in this case and authorized by article 189 of the Code of Practice.

It was also objected that the plaintiff had appeared in court in another suit by another party on a similar citation which seems to have been served in the same way, and that he was estopped by this fact from any attempt to invalidate the return in this case. We have not been favored with any precedents in support of this novel application of the doctrine of estoppel, and see no foundation for it in principle.

It seems clear that R. Fischer was not "living in the house" which was the domicile of Lewis at the time of service, C. P. 189; and that, therefore, Lewis was not constructively cited. It is not pretended that he was served in person. We do not see any error in the judgment in favor of plaintiff Lewis.

Judgment affirmed.

Reharing refused.

## No. 2802.—H. C. BROWNE v. SILVESTER BENNETT.

Notes which have been stamped with the required internal revenue stamps, are admissible in evidence without the stamps being canceled as required by law.

**A**PPEAL from the Second Judicial District Court, parish of Jefferson. *Pardee, J. M. O. Dunn*, for plaintiff and appellee. *Breaux & Fenner* and *N. Commandeur* for defendant and appellee.

LUDELING, C. J. This is a suit for rent upon a contract of lease and rent notes executed at the same time. There was judgment in favor of the plaintiff and the defendant has appealed.

On the trial a bill of exceptions was taken to the reception of the notes and contract of lease in evidence on the ground that the stamps on the documents were affixed and canceled after their execution and without complying with the provisions of the revenue acts. We think the judge *a quo* properly received the evidence.

It does not appear from the record when the stamps were affixed, and the presumption of law is in favor of the regularity of acts done. The fact that the stamps appear to have been canceled at a subsequent period does not prove that the stamps were not affixed when the documents were executed. It was incumbent on the defendant to prove his allegation. Whether the stamps were canceled after the execution or not at all, is unimportant, as the act of Congress does not expressly forbid the reception in evidence of instruments which are stamped, unless the stamps be canceled. 22 An. 131; Parson's Contracts, vol. 3, p. 290.

We think the credit of one hundred dollars claimed for the receipt filed was properly not allowed. It was probably for a credit on one of the rent notes which were taken up. At any rate, it is not proved to be a credit on the indebtedness sued upon in this suit.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed with costs of appeal.

No. 2554.—GUSTAVE SONIAT DUFOSSAT and THEO. SONIAT DUFOSSAT  
v. FRANCOIS J. LAIZER.

The plea of prescription can not be filed or heard in the Supreme Court in a case where an appeal has been taken from an order of seizure and sale. The remedy in such a case is by injunction.

**A**PPEAL from the Second Judicial District Court, parish of Jefferson. *Pardee, J. Charles F. Claiborne*, for plaintiff and appellee. *W. B. Hyman*, for defendant and appellant.

LUDELING, C. J. This is an appeal from an order of seizure and sale. The only ground urged in argument by the appellant in this court is, that he has filed the plea of prescription in this court, and he



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urges that the notes are prescribed on their face. It has been often decided by this court that the only question which can be examined in a case on appeal from an order of seizure and sale, is, whether or not the evidence before the judge *a quo* authorized the fiat. The law authorized the executory proceedings—the defendant could not in that proceeding have made the plea before the judge *a quo*, for the proceeding *via executiva* is intended to be *ex parte* on the confession of the defendant. If he could file the plea in this court, it would necessarily defeat the executory proceeding, for the plaintiff has the right in all cases where the plea of prescription is filed in this court, to have the cause remanded to enable him to show an interruption, and that would necessarily change the character of the proceedings to the *via ordinaria*. We adhere to the opinion expressed in Gill & Grinault, tutrix, v. Hosmer, administrator, that the questions of prescription and the interruption of prescription can not be considered on an application for an order of seizure and sale. The remedy, in a case where an order of seizure and sale has been granted on a note, which is prescribed, is by injunction, under article 739 of the Code of Practice.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed with costs of appeal, and ten per centum on the amount of the judgment as damages for a frivolous appeal.

Rehearing refused.

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No. 4448.—THE STATE OF LOUISIANA ex rel. GEORGE E. BOVEE v. FRANKLIN J. HERRON.

Article 620 of the Code of Practice makes it obligatory upon the clerks of the district courts in cases where mandates and decrees from the Supreme Court have been presented for execution to at once, and without any order or decree from the judge *a quo*, issue the necessary process to execute the judgment of the Supreme Court. A refusal or failure on the part of the clerk to comply with this article of the Code of Practice in any case where he has been required to do so, will subject him to punishment for contempt by the Supreme Court, for disobedience to the mandates of the law.

Under this article of the Code of Practice the judge of the district court has nothing to do with the execution of the orders and decrees of the Supreme Court. Therefore, if a judge of a district court interferes with or obstructs, or hinders in any way, as judge, the execution of a judgment of the Supreme Court, he will be held guilty of a contempt of the authority of that court, and the plea of ignorance of the provisions of this article will not shield him from the penalties denounced against those who obstruct the execution of the mandates of this tribunal.

**A**PPPLICATION for a Writ of Mandamus. *John Ray*, for relator. *William A. Elmore*, Acting Judge, and *Edward T. Manning*, Acting Clerk, respondents. *W. W. King* and *John H. New*, for *W. A. Elmore*.

LUDELING, C. J. A rule for contempt has been asked for against *Wm. A. Elmore*, acting judge of the Eighth District Court of the parish of Orleans, and *Edward T. Manning*, acting clerk of said court, based on the following averments, which are sworn to by the relator,

George E. Bovee, to wit: That a judgment was rendered by this court in the case entitled *The State of Louisiana ex rel. George E. Bovee v. Franklin J. Herron*, No. 3969, which became final by agreement of the parties, filed on the third of December, 1872; that, on motion of the relator, it was ordered by this court that the clerk do issue the mandate of this court in said cause forthwith; that the mandate of this court was issued, and was presented to said Edward T. Manning, acting clerk in the court in which the said case was originally tried and from which the appeal was taken, and that he was requested and required to file and record the mandate, and to issue the process necessary to cause said judgment to be enforced. That said Manning filed the judgment, with a copy of the agreement of the parties and the order of the Supreme Court thereon, but refused to issue the necessary writ to cause the judgment to be executed, in contempt of the authority of this court and in disregard of the law, alleging that he was prohibited by the said William A. Elmore from doing so. The answer of William A. Elmore is as follows:

"That on the fourth day of December instant, on the opening of the Eighth District Court, over which he was then presiding, John Ray, Esq., presented to the court a motion requesting that the judgment of the Supreme Court, rendered in the case of the *State of Louisiana ex rel. George E. Bovee v. F. J. Herron*, "be filed, recorded and rendered executory, and that a writ issue to the civil sheriff of the parish of Orleans to cause said judgment to be executed," etc. "That upon examining said judgment of the Supreme Court, the respondent discovered that the judgment had been rendered by the Supreme Court on the second instant. As by law that judgment could not be final or executory until after the lapse of six judicial days, when but one had passed, he refused to grant the said motion.

"Before the said motion was made the clerk of the court asked the respondent what he should do in the premises, the judgment of the Supreme Court having been previously handed to him by counsel for Bovee. Respondent instructed him not to issue any writ of possession without consulting the court.

"On the fifth instant, at about twelve o'clock, the clerk of the court came to respondent and informed him Mr. Ray, counsel for Bovee, relator, wanted him to issue a writ of possession in favor of said Bovee v. F. J. Herron, in said case of *State ex rel. Bovee v. Herron*. The clerk also presented at the same time the judgment of the Supreme Court in the case and the order of the Supreme court made on the fifth instant. Both hereto annexed, marked A B. Upon examining said papers respondent discovered that a certificate of the clerk of the Supreme Court had been added to the judgment of the Supreme Court, to the effect that the parties to the suit of the *State ex rel.*

Bovee v. Herron had waived the legal delays necessary to make the said judgment final. This certificate had been added to the judgment subsequent to the time when the judgment was presented to respondent's court. Respondent also observed that an order of the Supreme Court had been obtained, upon consent of parties waiving the six days' delay allowed by law to render the decision final. The clerk desired advice of respondent as to the issuing of a writ of possession to said Bovee, under the judgment of the Supreme Court.

"Respondent instructed him not to issue the said writ, as the judgment of the Supreme Court had not been recorded according to law.

"At the time the judge thus consulted respondent, he exhibited to respondent the order of the Supreme Court, dated December 5, 1872, hereto annexed, marked B. This order required the clerk of the Supreme Court to issue to plaintiff a copy of the mandate of the court. Your respondent considers that the mandate could only be properly issued by that clerk after said order of the Supreme Court had been given. No such copy accompanied the said order or was exhibited. The only one exhibited was dated December second, and was issued as your respondent believes illegally, and did not authorize the recording and executing the judgment. Respondent further states that when the clerk of the district court consulted him as above stated, on the fifth of December, it was after the court had adjourned, on motion of J. B. Howard, Esq., an attorney at law, as an evidence of respect to the late Horace Greeley. That no order of court could then be given in the premises on account of said adjournment. No application other than the one already mentioned on the third of December, was made to respondent's suit. Respondent here states that if an application had been made to his court, in conformity with the order rendered by the Supreme Court, at any time, he would have promptly complied with the same.

"And further answering, respondent disclaims all idea of any intended disrespect of the Supreme Court or any member or officer thereof, but says he acted under his convictions of his duty in the premises. If he erred in his instructions and advice to the clerk of this court, he will cheerfully abide the opinion of this honorable court, and endeavor to perform his duty in obedience thereto. All of which is respectfully submitted, with the prayer that he be discharged."

The answer of Edward T. Manning is, "that he was instructed by his Honor Judge Elmore, to whom he applied for information, when John Ray, Esq., demanded a writ of possession on a mandate of this honorable court, that it was not proper or legal to give the same until the mandate of the Supreme Court was spread upon the minutes of the District Court, by motion in open court, and as this had not been done in the case in question, respondent declined to accede to the request

of the said attorney. Respondent respectfully disclaims any intention of disobeying any decree or order of this honorable court, which at all times he is ready and prompt to obey."

The affidavit of Mr. Ray, filed in this case, discloses the following facts: That on the third of December, 1872, he obtained a copy of the opinion of the Supreme Court in the above entitled case and presented it to the Minute Clerk of the Eighth District Court of the parish of Orleans, and requested him to file and record it, and to issue the necessary writ to the sheriff to have the same executed. The clerk filed the copy of the judgment, but declined to issue the writ, saying he wished me to get the order of the court to issue such writ. I told him that it was not necessary, but he persisted. The next morning, upon the opening of the Eighth District Court, I presented a motion to the court with the copy of the judgment of the Supreme Court, and asked that the same be filed and recorded, and that the necessary writ be issued to have the same executed, when the judge refused to make the order, saying there was no evidence that the delay for an application for a rehearing had expired.

I then obtained a copy of the agreement of the parties to the suit waiving the time for applying for a rehearing, and also a copy of the order of the Supreme Court directing the clerk of the Supreme Court to issue the mandate in this case. I then took the said mandate, copy of agreement between the parties, and order of the Supreme Court and presented them to — Manning, clerk of the Eighth District Court, on the fifth instant, and requested and directed him to file and record the same and to issue the requisite writ to cause said judgment to be executed. He said he would have to see the judge first. I referred him to the articles 618, 619 and 620 of the Revised Code of Practice, and read them to him. I requested him to show this law to the judge and gave him the book to do so. He went into an adjoining room, and after an absence of about five minutes returned, saying to me the judge said he might file the papers, but had forbid him from issuing any writ to execute the judgment until ordered by him to do so. He filed the above documents, but refused to do more, saying I must get an order of the court before he could do anything further. I then told him I would resort to the legal remedies for redress of my client, and he said "very well."

From the foregoing statements a disposition to obstruct the execution of the mandate of this court in that case is clearly manifest. It is unusual for the judge *quo* to require other evidence of the finality of a judgment of this court than the copy of the mandate properly certified by the clerk to be a true and correct copy. There is no other evidence than that required by law. If it could be presumed that the clerk had violated the law and his duty by issuing a mandate before

the judgment had become final, the party against whom the judgment was rendered would not be without his remedies to enforce his rights; and it was officious on the part of the judge *a quo* to assume to act in his interests. From the statements in argument of respondent's counsel it seems to be still the practice in this city to obtain an order from the court *a qua* to file, record, and render executory the mandates of this court—although the law does not require this—and the judge *a quo* should have made the order on the motion presented on the fourth of December. But, to satisfy the acting judge and clerk, the relator, through his attorney, obtained from this court an order which practically declared that the judgment in the case of Bovee v. Herron had become final, in consequence of the written agreement of the parties to that suit to waive the legal delays, by ordering the clerk to issue the mandate in said cause. He then presented to the said clerk copies of the mandate of this court of the agreement between the parties to the suit of Bovee v. Herron, waiving the legal delays and of the order of this court thereon, and directed the said clerk to record the mandate, and to issue the necessary process to place the relator in possession of his office. At the same time he directed the attention of the said clerk to the law, and read to him articles 618, 619 and 620 of the Revised Code of Practice. Article 620 declares that “this recording shall be directed to be made by the party wishing to make use of this judgment, but without any obligation on his part to give previous notice to the opposite party; and the clerks of the district courts shall have the power to receive, file and record all mandates and decrees rendered by the Supreme Court, and to issue all legal process thereon.”

It further appears that the clerk then took the documents above mentioned and the Code of Practice to the said judge, who instructed him not to issue any writ until the further order of the Eighth District Court. It was stated in argument that the judge had not had his attention called to article 620 of the Revised Code of Practice. Be that as it may, ignorance of the law is no excuse; but we can not presume that the learned judge was ignorant of a textual provision of the Code of Practice. It was also insisted in argument, and the same fact is relied on in the answer of the judge as a justification of his conduct, that no mandate of the Supreme Court was issued after the order of the fifth of December, and that the only copy of the mandate presented to the judge was the one issued on the third of December. No other copy was necessary. The mandate was properly issued, and the pains to which the relator unnecessarily put himself to satisfy the respondents did not necessitate any other copy of the mandate. It was a true copy; and even if it had been made prematurely (which however was not the case), still there could have been no good reason for requiring another copy. “*Lex neminem cogit ad vana, seu inutilia.*”

Both respondents have disclaimed any intentional disrespect to the Supreme Court or to any of the members thereof. We readily accord credence to this statement. But the facts disclosed in this case force upon our minds the conviction that the respondents have willfully obstructed the execution of the mandate of this court, in defiance of the law and in contempt of the authority of this court; and although we regret the necessity which constrains us to exercise the power conferred by law to vindicate our authority, yet we can not fail to exercise it in this case without a dereliction of duty. C. P. art. 131.

It is therefore ordered and adjudged that William A. Elmore, acting judge of the Eighth District Court of the parish of Orleans, be fined fifty dollars and be imprisoned in the parish jail ten days for a contempt of the authority of this court; and that Edward T. Manning be fined fifty dollars and be imprisoned five days in the parish jail for a contempt of the authority of this court; and that the respondents pay costs of these proceedings.

KENNARD, J., *dissenting*.

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NO. 2528.—RUFUS WAPLES v. THOMAS LAYTON AND THE SOUTHERN BANK.

In this case the Southern Bank had Judge Eustis employed by the year at a fixed salary to attend to its legal business. During the absence of Judge Eustis the bank employed the firm of Waples & Eustis to attend to its business in litigations to which the bank was a party, for which they bring this suit for their fees. The bank offered as a defense conversations between the officers of the bank and Judge Eustis, before his departure, showing that during his absence the firm of Waples & Eustis would attend to the legal business of the bank free of charge.

Held—That such conversation was in no manner binding on the firm of Waples & Eustis, and that they were entitled to recover their fees from the bank.

**A**PPEAL from the Seventh District Court, parish of Orleans. *Collens, J. R. Waples*, in person, and *Lacey & Butler*, for plaintiff and appellant. *Roselius & Phillips*, for defendants.

WYLY, J. The plaintiff sues the defendants for \$6900 for professional services rendered by the firm of Waples & Eustis to the Southern Bank in the cases stated in the petition, the interest of Eustis in said claims being transferred to Waples.

The court dismissed as of non-suit the case, and the plaintiff appeals.

The exception of *res judicata* can not be maintained for the reasons stated in the written opinion of the judge *a quo*.

That the firm of Waples & Eustis rendered the services and were employed to represent the Bank, there is no doubt. The fact is fully established by the evidence. That they were employed in these cases to represent Judge Eustis, the regular attorney of the Bank, and acted for him without expecting remuneration for their services from the

*Waples v. Layton and the Southern Bank.*

Bank, is not satisfactorily established. On the contrary, it is not shown that they ever consented to take the cases on such terms. No conversation between the officers of the Bank and Judge Eutis that the firm of Waples & Eustis would, for him, attend to the business of the Bank during his absence from the city and charge the Bank nothing therefor, could bind the plaintiff or the firm of Waples & Eustis unless it be shown that they consented to the arrangement and took the business on such terms. This has not been shown.

The account is satisfactorily established by the evidence against the Southern Bank. No claim is established against the defendant Layton individually.

It is therefore ordered that the judgment appealed from be annulled, and that the plaintiff recover judgment against the Southern Bank for six thousand nine hundred dollars, with legal interest thereon from judicial demand, and all costs.

Rehearing refused.

No. 2631.—GILBERT LYMAN *v.* KATE TOWNSEND.

A person owning a house in the city of New Orleans situated within the limits of the district where the keeping of houses of prostitution are allowed by the city, may lease his house for that purpose and recover the rent from the lessee. In such a case the lessee can not be permitted to plead the immorality of her own calling as a shield against the payment of the rent of the property which she has used.

The decision in the case of *Kathman v. Walters*, 22 An., page 54, is overruled by this decision.

**A** PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Whitaker & Bice*, for plaintiff and appellant. *L. Madison Day*, for defendant and appellee.

**TALIAFERRO, J.** This is a suit on a contract of lease. The plaintiff alleges that he leased to the defendant a house in New Orleans, on Customhouse street, for a term of five years from the first of December, 1866, at the rate of \$200 per month, payable in advance; that the defendant has failed to pay the rent in accordance with the contract, and specifies certain sums due and to become due, for which he prays judgment. He seized provisionally the furniture in the house in virtue of his lien as lessor.

The defendant avers that in conformity with her engagement she paid the rent at the rate of \$200 per month up to the first of February, 1868, and since that time up to the first of December, 1868, she paid by agreement with and consent of the plaintiff \$150 per month as compensation in full for the rent per month. She further alleges that the building she leased from the plaintiff was used as a house of prostitution and intended so to be used at the time the lease was made, and that with the knowledge and consent of the plaintiff. That the contract is void, as being one reprobated by law and against morals.

There was judgment in the court below as of non-suit, and the plaintiff has appealed.

It will, in the first place, be proper to inquire whether the keeping of brothels or houses of prostitution are prohibited by law. By the statute of 1855 relative to crimes and offenses, p. 144, section 92, under the head of "Offenses against Public Order, Health and Police," it is enacted, "that whoever shall be guilty of keeping any disorderly inn, tavern, ale house, tippling house or brothel, shall suffer fine or imprisonment, or both at the discretion of the court, and the offender may likewise be adjudged to forfeit his license to keep a house of public resort or entertainment." The prohibition here expressed is not against the keeping of houses of the kind mentioned, but against keeping disorderly houses of the character specified. In the case of the city of New Orleans v. Eliza Costello, 14 An., p. 37, this court said, in reference to this ninety-second section of the act of 1855, that it "does not prevent the city from levying a tax upon boarding houses kept for these people (meaning lewd women), provided they do not license disorderly houses of this class." The city heretofore levied "an annual license tax of two hundred and fifty dollars upon each and every person keeping any house, room or dwelling for the purpose of renting rooms to or boarding lewd and abandoned women." Whether such license tax is now imposed we are not apprised. The city clearly has the right to impose a license tax of that kind.

It appears that, by ordinances of the city, certain districts or localities are defined within which alone the keeping of houses of the class mentioned in the ninety-second section of the act of 1855 is permitted, and it is shown that the house leased by the plaintiff to the defendant is situated within one of these districts. It seems then that no law of this State prohibits the disreputable calling or occupation which the defendant in this case is not slow in admitting she is engaged in. It permits such trade or occupation on the condition that it be prosecuted in an orderly manner and within certain specified limits. Houses are indispensable for the shelter and lodgment of the persons so employed. Is it unlawful for the owner to lease a house for such a purpose? If his fate be so cast that his buildings fall within localities in some sense degraded by the law-maker, subjecting them to the annoyance of public brothels, should he be debarred from deriving revenue from the lease of his buildings to be used for such establishments? He is required to pay a pro rata tax upon his property which, it might be from its unfortunate location, could not be leased for any other purpose. These questions may be answered by recurring to the right we find that persons of the class of the plaintiff possess under the law to keep houses of ill fame. With that right they are impliedly vested with the right to buy or lease buildings for their business. The right to



lease a house to be used for the purposes of a brothel implies a corresponding right in the owner to let a house for such a purpose. Contracts for such purposes are repulsive to the moral sense, but when allowed by law what warrant is there for declaring them null as being contrary to good morals? Courts have not to deal with the question whether laws sanctioning contracts of the kind are wise or unwise. Upon the legislator is imposed that difficult and ungrateful task. It is for him to encounter the danger of passing between Scylla and Charybdis. It is for him, in pondering the vexed problem, to view society just as it is, and not as we desire it should be. His trouble in this direction is, that he can raise man's moral standard no higher than his physical condition will permit. It is for him to divine, in regard to these things, whether from necessity, great evils must not be tolerated in order that greater ones may be avoided—whether he should mitigate, even if it be at the expense of enactments offensive to the moral sentiment of many, deep rooted evils which he is unable successfully to combat. Upon such a basis many of the strong thinkers of the present day are inclined to legislate.

In the case now under consideration if we should decide the issue adversely to the plaintiff there would be presented the awkward anomaly of the defendant being able legally to lease the plaintiff's house for disreputable purposes, and after having used it for many months avoid payment according to contract by openly avowing her own turpitude in pleading in defense her violation of morals in the use to which she put the premises leased. To annul the contract in the interest of the defendant would seem to outrage morals at least as much as it would to enforce it in behalf of the plaintiff.

As opposed to the views here intimated we are referred to the decision of this court in the case of *Kathman v. Walters*, 22 An., p. 54. The opinion in that case, after a more thorough and deliberate consideration of the subject, we are not inclined to sustain. In the case at bar we think the plaintiff should prevail.

It is therefore ordered that the judgment appealed from be annulled; that the plaintiff have judgment in his favor against the defendant, as follows: That he recover from the defendant the sum of eight hundred dollars, with legal interest on two hundred dollars thereof from first December, 1868; with like interest on the like sum of two hundred dollars from first January, 1869; like interest on the like sum from first of February, 1869; and like interest on the like sum from first of March, 1869; that he recover from the defendant the further sum of forty-six hundred dollars with legal interest upon the several installments composing that sum as they severally became due, according to the terms of the written contract of the parties—legal interest to be so computed, commencing on the first of April, 1869, for two

hundred dollars and so successively on each subsequent installment of like amount becoming due respectively on the first day of each month until the first of February, 1871. It is further ordered that the lessor's privilege be recognized in favor of the plaintiff upon the furniture provisionally seized by him in this case, and that the same be sold and the proceeds applied towards the payment of this judgment. And it is further ordered that defendant and appellee pay all costs of these proceedings.

HOWELL, J., *dissenting*. For the reasons given in my dissenting opinion in the case of Hubbard v. Moore, just decided, and on the authority of Kathman v. Walters, 22 An. 54, I dissent in this case. I am not aware that such houses are licensed by law.

Rehearing refused.

No. 3620.—MRS. M. BRAND v. N. A. BAUMGARDEN, Testamentary Executor, et als.

In the last will and testament of Mrs A. M. Schneider, the following clause appears: "Thus done and passed in the house and room above described, on the above day and date, and signed by the said testatrix, the witnesses and the undersigned notary, the said testatrix having declared she could not write, made her usual mark."

Held—That the declaration that she could not write, followed by making her usual mark, was equivalent to the declaration that she knows not how to sign as required by article 1572 of the Civil Code.

APPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. J. L. Tissot and A. B. Phillips*, for appellants. *D. C. Labatt and B. L. Preston*, for appellees.

HOWELL, J. The only question to be decided in this case is, whether the last will and testament of Mrs A. M. Schneider is in due form, as a nuncupative testament by public act.

The clause in the will, on which the objection to its validity is founded, is as follows: "Thus done and passed in the house and room above described, on the above day and date, and signed by the said testatrix, the witnesses and the undersigned notary, the said testatrix having declared she could not write, made her usual mark."

It is urged that this is not a compliance with the requirements of article 1572 Revised Civil Code, because it does not state that the testatrix declared that she did not know how to sign, and no mention is made of the cause that hindered her from signing her name. The declaration that "she could not write" not being equivalent to the declaration that "she knows not how to sign," as required by the Code.

Plaintiff's counsel quotes several French authors and the opinions of several French lawyers to support this position, but they have failed to convince our judgments.

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Mrs. M. Brand v. Baumgarten, Testamentary Executor, et als.

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Had the words "not know how to write" instead of the words "could not write" been used, there would be no room for doubt as to their sufficiency; but still the expression "she could not write" followed by the one "she made her usual mark," indicates sufficiently the "hindering cause," if mention of the hindering cause be required by article 1572 in the case where the testator does not know how to sign his name. We prefer to say that the words used in this instance, taken all together, are equivalent to the declaration by the testatrix that she did not know how to sign her name, and therefore made her mark, as a verification of her name as written by the notary, and explaining why she did not herself write her name or signature, and that there has been, in this respect, a sufficient compliance with the requirement of the law.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of defendants, recognizing the validity of the will in question with costs in both courts.

Rehearing refused.

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NO. 2735.—LOUIS HASELMAYER v. WILLIAM H. McLELLAN.

In a damage suit, if the verdict of the jury is not supported by the evidence it will be set aside on appeal, and judgment will be given for such amount as the evidence sustains.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Breaux & Fenner and Horner & Benedict*, for plaintiff and appellant. *E. Shackelford*, for defendant and appellee.

This case was tried by a jury in the court below.

LUDELING, C. J. The plaintiff, who styles himself an escamateur and legerdmain performer, sued the defendant for damages resulting from the breaking, by the minor son of defendant, of a glass bell used by him in his performances. He claimed twenty-five hundred dollars. A jury rendered a verdict in his favor for one thousand dollars. The judge *a quo*, in refusing a new trial expressed himself as not satisfied with the verdict, but still refused a new trial and rendered judgment for the sum found by the jury. From this judgment the defendant has appealed. The testimony satisfies us that only the glass bell was broken and that the value thereof did not exceed one hundred dollars. Civil Code articles 2318, 2319, 2324.

It is therefore ordered and adjudged, that the verdict of the jury and the judgment of the court *a quo* be set aside, and that there be judgment in favor of the plaintiff against the defendant for one hundred dollars, with five per centum per annum interest from judicial demand and cost of the lower court. It is further ordered that the plaintiff and appellee pay costs of appeal.



## ADDENDA.

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T. T. TYREE & Co. v. SANDS & Co.—THOMAS P. MILLER & Co.,  
Intervenors.

**A**PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Campbell, Spofford & Campbell and Clarke, Bayne & Renshaw*, for plaintiffs and appellees. *Randell Hunt and William H. Hunt*, and *Dirrhammer & Kennard*, for intervenors and appellants. *Walker Fearn*, for defendants. 24 An. Rep., p. 363.



## LIST OF CASES NOT REPORTED.

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### NEW ORLEANS.

- 2455.—Dominick O'Grady *v.* P. J. McGuire.  
2667.—City of New Orleans *v.* Captain Mayo et al.  
2441.—Dr. Samuel Walker *v.* Benj. W. Lauck.  
2372.—L. T. Delassize *v.* Abat, Generis & Co.  
2451.—John J. Dilworth *v.* E. W. Burbank.  
3543.—State ex rel. Lynne et al. *v.* Walton, Administrator of Finance.  
2231.—Robt. C. Wickliffe *v.* Robertson Yeatman.  
3487.—State *v.* Leslie.  
3602.—City of New Orleans *v.* Stoddart Howell.  
3552.—L. E. Armsink & Co. *v.* Thompson & Barnes.  
2393.—Perry & Co. *v.* Austin & Goodwyn.  
3399.—J. M. Isaacks *v.* A. C. Miller & Co.  
2416.—P. Mallard *v.* W. H. Cooley.  
2430.—William Cline *v.* M. F. Bigney.  
3536.—New Orleans, Mobile & Chattanooga Railroad Company *v.* Freret Brothers.  
3534.—New Orleans, Mobile & Chattanooga Railroad Company *v.* F. A. Luling.  
— —R. S. Jackson *v.* John C. Dunbar, Administrator.  
3823.—Martin, Cobb & Co. *v.* S. S. Coons.  
3849.—Peter Viterman *v.* Parson & Levy.  
3742.—Samuel Smith *v.* J. F. & A. C. Manning.  
3712.—Benj. Cooper *v.* Police Jury of Rapides.  
3479.—Louis D. Larrieu *v.* F. Dumonteil.  
3671.—Augustin & Thibaut *v.* Eloi Decharry.  
3774.—Eugenia M. Rossman *v.* Randell Gobson.  
3403.—Mr. and Mrs. Platz *v.* Henry Weiser.  
3751.—Joseph Hoy & Co. *v.* B. Weiss.  
3798.—A. V. Davis *v.* Henry S. Dawson et al.  
3810.—Frank D. Henderson *v.* William James, Tutor.  
3748.—Joseph Hoy & Co. *v.* Mrs. A. C. Manning.  
3756.—John M. Bonner *v.* John F. Irvine.  
3747.—Catharine Dautagnan *v.* Mary V. Price et al.  
3761.—Succession of Amanda Hatcher.  
3601.—John W. Fairfax *v.* James Graham, Auditor.  
3121.—James T. Souther *v.* Mrs. Lavina Edwards et al.  
3791.—Mrs. E. Tabure et al. *v.* Parish of Iberville.  
3757.—Mrs. Dora Ross *v.* Joseph Newsham.

- 2380.—*Spencer Field v. Bayou Sara Packet Company.*  
3722.—*State v. James Pairre.*  
3960.—*State ex rel. City of New Orleans v. Judge of the Sixth District Court.*  
3723.—*State v. Lewis Richardson.*  
3489.—*State v. Josephine Ray.*  
3757.—*Jesse B. Simms v. Robert E. McCausland.*  
3631.—*State v. Collins Scott.*  
3411.—*State v. Alfred Holmes.*  
3488.—*State v. Billy Boyd et al.*  
3691.—*State v. James Dailey.*  
2560.—*Timothy J. White v. City of New Orleans.*  
2562.—*Daniel Conely v. City of New Orleans.*  
3907.—*F. M. Fisk v. Ed. Wright et al.*  
3921.—*Fellows & Mills v. The City of New Orleans.*  
2784.—*Adam Turnbull v. A. Freret et al.*  
2763.—*Circus Street Infirmary v. Board of Police Commissioners.*  
3679.—*Valcour Labarre v. Wm. Omer Lavvve et al.*  
3335.—*Mrs. L. D. Minor, Tutor, v. James A. Ventress et al.*  
3833.—*P. F. Minor v. Florence Ventress.*  
3832.—*Mira F. Minor v. Florence A. Ventress.*  
3973.—*State v. Henry C. Gray.*  
2503.—*S. Griffin v. Charles Schayo.*  
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3830.—*Estate of James A. Brown.*  
3809.—*E. G. Henderson v. W. C. James, Tutor.*  
2750.—*Victor Belot v. City of New Orleans.*  
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## ABSENTEE.

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## ACTION.

1. An action by creditors to enforce a claim against a succession, can not be maintained after the succession has been closed and the heirs have been legally put in possession of the estate.

*Successions of Durnford v. Urquhart*, 114.

2. A party in possession of real property under a recorded title ostensibly valid, can not be disturbed by any collateral proceedings instituted for the purpose of invalidating his title. Any inquiry looking to the nullity of such a title can only be entertained under the direct form of action. 23 An. 175.

*Doherty v. Leake*, 224.

## AGENT AND AGENCY.

1. A power of attorney which gives the agent the authority "to cite and appear," must be construed as conferring upon the agent the power to prosecute and defend suits which may be brought by or against his principal. A sale of property under a judicial proceeding carried on contradictorily with the agent who holds such a power of attorney is not, therefore, void for want of authority in the agent to represent his principal in the litigation.

*Miller v. Marmiche*, 30.

2. A person who has been acting as agent for another, can not be held personally liable for a draft which he has given in favor of a third person, if the consideration for which the draft was given inured to the benefit of his principal, especially if it be shown that the payee of the draft knew at the time he took it that the drawer was only acting as agent or overseer for another; the agent would be still less liable if the draft itself showed on its face that it was not to be charged to the drawer, but to be charged to the account of his principal.

*Milligan v. Lyle*, 144.

3. An agent is only bound personally when he contracts without the authority or sanction of his principal. But if, as in this case, the principal subsequently ratifies the contract made by his agent, then and in such case the agent is not personally bound.

*Walter v. Cruikshank*, 311.

4. The authority of an agent to bind his principal by giving a promissory note and of fixing the signature of his principal thereto must be express and special. But in a cause like this, where the agent is authorized to settle a debt, the principal is not bound

## AGENT AND AGENCY—Continued.

on the note which the agent gives in settlement of the debt, because the authority of the agent to sign the name of his principal to the note was not expressly given.

*Hills v. Upton*, 427.

5. An agent who has transcended his authority in the collection and investment of the proceeds of notes is not liable therefor, if the principal, on being advised of the collection and investment by the agent himself, fails to notify him promptly that he repudiates his acts.

*Oliver v. Johnson*, 460.

## APPEAL.

1. If the record of appeal contains no note of the evidence offered in the court below, the appellate court will presume that the court *a qua* proceeded upon proper evidence. In reference to the question of bills of credit, the doctrine announced in the case of *Smith v. City of New Orleans*, 23 An. 5, is affirmed by this decision.  
*Smith v. City of New Orleans*, 20.
2. The appeal will be dismissed on motion, if more than three judicial days pass, after the return day, before the record is filed in the appellate court.  
*Farmers' and Manufacturers' Aid Association v. Strawbridge*, 126.
3. If a suspensive appeal has been dismissed because the appellant has failed to file the record in the appellate court within three judicial days after the return day, he can not afterward be allowed to take a devolutive appeal from the same judgment. 4 An. 30; 9 An. 39.  
*Redmond v. Mann*, 149.
4. If two appeals have been taken from different judgments, rendered at different times between the same parties and founded upon the same cause of action, the one devolutive and the other suspensive, and both appeals are presented in one record, the appeals will not be dismissed on that account, if both appeals are susceptible of being passed upon at the same time. *Newell v. Buckner*, 185.
5. The signature of the judge to the minutes of the court is only his attestation of their correctness, and can not be regarded as his signature to a final judgment. An appeal taken from a judgment attested in this way will be dismissed on motion because it is not signed by the judge.  
*Scott v. Goodrich*, 259.
6. In matters of appeal the law does not authorize the appointment of a curator *ad hoc* upon whom citation of appeal may be served. In such a case, if the appellee is not present service of appeal may be made upon the advocate or attorney of record, but it can not be made legally upon a curator *ad hoc* appointed for that purpose.  
*Stevenson v. Edwards*, 266.
7. In this case an order of appeal was granted from one branch of the

**APPEAL—Continued.**

judgment, but no bond was given. In the other a bond was given, but no order of appeal was granted. Held—That the appeal must be dismissed for want of jurisdiction.

*Louisiana State Bank v. Barrow*, 276.

8. Where the return day for an appeal has been inadvertently fixed on a non-judicial day (Sunday) the appellant is entitled to the whole of the next day to file his appeal. •

*State ex rel. Luling v. Judge Fourth Judicial District Court*, 333.

9. A transcript of appeal is considered as filed in the appellate court from the moment that it has been deposited with the clerk, although the formal indorsement thereon was not written until the following day. *Ib.*

10. A third party, whose property has been taken out of his possession by a proceeding under a judgment for a less amount than five hundred dollars, has the right to appeal, if the amount of property taken is above five hundred dollars; and in case the judge *a quo* refuses the appeal, a mandamus will issue from the Supreme Court, on the application of such third party, directing the judge *a quo* to grant the appeal.

*State ex rel. Simonds v. Judge of the Sixth District Court*, 424.

11. If the main action is sufficient in amount to give the appellate court jurisdiction of the appeal, then other parties to the suit are entitled to the benefits of the appeal without regard to the amount involved. An appeal is valid if it be taken by motion in open court, and the bond be given in favor of the clerk. Such appeal will not be held irregular because the party afterward so considered it, and took another appeal by petition where all the parties were not cited.

*Haughery v. Thiberge*, 442.

12. Where a devolutive appeal has been taken from a judgment which directs a certain number of pounds of cotton to be delivered to the plaintiff, or in default thereof to pay a certain amount in money, and execution has issued thereon, the delivery into the hands of the sheriff of the cotton is not a voluntary execution of the judgment, and the devolutive appeal may be prosecuted thereafter.

*Yale v. Howard*, 458.

13. An appeal will not be dismissed because a copy of the petition of appeal has been sent up with the record in place of the original.

*Burns v. Naughton*, 476.

A third holder of a mortgage note under indorsement must show an authentic transfer before he can legally obtain an order of seizure and sale of the property mortgaged. *Ib.*

14. An appeal that has been taken before the judgment is signed is nugatory, and another appeal taken after the judgment is signed is in no manner affected by the one taken before the signing.

*Consolidated Association of the Planters of Louisiana v. Mason*, 518.

## APPEAL—Continued.

15. The time allowed by law for taking a devolutive appeal only commences to run from the date of the signing of the judgment, and in case the appeal is taken by motion in open court at the same term the judgment is signed, citation of appeal is unnecessary. 23 An. 618. *Ib.*

16. If an appeal has been granted and filed in the Supreme Court it can not afterward be withdrawn without the consent of the Supreme Court. The consent of the parties or the counsel does not divest the appellate court of jurisdiction over the case. The district court which granted the appeal is therefore divested of jurisdiction over the case until the appellate court has acted on the appeal. In case the court *a qua* assumes to act in the case after the appeal has been taken—before the Supreme Court has acted on the appeal—a writ of prohibition will issue on application of the appellant, restraining the judge *a quo* from further proceedings in the cause.

*State ex rel. Graham v. Judge of the Eighth District Court, 598.*

17. An appeal will lie from a judgment on the opposition of a third person to regulate the effect of the seizure in what relates to him, and a writ of mandamus will, in case of the refusal of the judge *a quo* to grant the appeal, issue compelling him to grant it.

*State ex rel. Bagur v. Judge of the Eighth District Court, 599.*

18. A judgment for alimony for two hundred and fifty dollars per month, pending the suit for divorce, is appealable and can not be defeated by a *remittitur* on the part of the judgment creditor so that it shall not exceed five hundred dollars, and on application to the Supreme Court the judge *a quo* will be compelled by mandamus to grant an appeal from such a judgment, notwithstanding the *remittitur*.

*State ex rel. Holbrook v. Judge of the Eighth District Court, 601.*

## APPEAL BOND.

1. A surety on an appeal bond who denies his signature can not, after it has been proved, be heard to urge other defenses to his liability on the bond. *Commercial Bank v. Harrison, 361.*
2. If an appellant dies after the appeal has been granted, but before the bond has been given and filed in the court below, then only the legal representatives of the deceased can execute the appeal bond. An appeal bond given by the agent after the decease of the principal is void, because the agency ceases at his death.

*Graham v. Hendricks, 477.*

## ATTACHMENT.

1. In an attachment suit, additional interrogatories may be propounded to the garnishee, after the first interrogatories have been answered, without going through the formalities of traversing the answers to the first interrogatories. *Ober v. Matthews, 90.*

**ATTACHMENT—Continued.**

2. The burden falls upon the intervenor in an attachment suit, who asserts ownership of the chattel attached, of showing a complete title in himself before the attachment. *Ib.*
3. An order given on the holder of a bill of exchange by the owner or agent to deliver it to a third person, will not enable such third person to defeat the rights of an attaching creditor, who has levied an attachment on the bill as the property of his debtor. *Ib.*
4. A bill of exchange or promissory note found in the State of Louisiana, may be attached by the creditor of its owner, although the contract out of which it originated was made in the State of Missouri between parties residing there at the time. *Ib.*
5. A person who has acted with other parties in an illicit enterprise, the object of which is to procure a false bill of lading for a cargo of cotton, and to destroy the vessel on which the cotton is to be shipped, for which such person has received a sum of money from the other parties, can not, when the other parties have absconded and an attachment has been taken out against them, and such person is made garnishee in attachment, set up that he received the amount of money from the conspirators in the fraud as a compensation for his services in enabling the creditors to ferret out the fraud, and thereby hold the same for his own benefit. To allow him to hold the amount thus received for his own benefit, would be to allow him to make a dishonest appropriation of the money of the debtor to the injury of the creditor.  
*Schaffer v. Forbes*, 107.
6. An attachment that has been granted on the oath of the creditor, that the debtor was about to convert his property into money, or evidences of debt, with intent to place it beyond the reach of his creditors, should not be dissolved on motion of the debtor, that the affidavit is false, if the evidence offered on the trial of the motion shows that the debtor was making an effort to sell his property, or place it out of his hands.  
*Wetherow v. Croslin*, 128.
7. To maintain an attachment under the allegation "that the defendant is about to assign and dispose of his property with intent to defraud his creditors," the evidence must show affirmatively, that the defendant is about incumbering or disposing of his property with the intention of defrauding his creditors.  
*Hoy v. Weiss*, 269.
8. An attachment is void if it is issued by a judge who has no jurisdiction over the case in which it is issued.  
*Rochereau v. Guidry*, 311.
9. The remedy by attachment is *stricti juris*, and when invoked to restrain the debtor from selling his property to the detriment of

## ATTACHMENT—Continued.

the creditor, proof of a specific act of immorality will not be received to impeach the credibility of the defendant as a witness on the motion to dissolve. *Ball v. Lignoski*, 484.

10. In attachment proceedings against a non-resident the sheriff must follow strictly the requirements of the Code of Practice in serving the attachment and citation by affixing copies of the same on the door of the building in which the court that issued the process is held, and the return of the sheriff must show that these formalities have been complied with, under penalty of nullity. C. P. 254. *Connell v. Medlock*, 512.
11. An attachment will lie against a debtor who is about to sell or dispose of his property to defraud his creditor.

*Abrams v. Teague*, 567.

12. An attachment which has been granted on the allegation that the defendant was about to remove his property out of the jurisdiction of the court without paying his debt will be set aside if the evidence fails to show such intention, and the attaching creditor will be condemned to pay the damages caused by its wrongful issue. Privileges spring from the law and not from contract.

*Durham v. Williams*, 568.

## ATTORNEYS AND ATTORNEYS' FEES.

1. In a suit for the value of attorney's fees for professional services rendered, if the amount allowed by the judge *a quo* seems reasonable and fair, the judgment will not be disturbed on appeal. *Phillips v. Stewart*, 152.
2. An executor or administrator is bound by his oath of office, to defend the rights of the succession he administers, and when suits are brought in the courts where the succession is administered, he may employ counsel to aid him, who must be paid by the succession. *Succession of Wells*, 162.
3. An attorney's fees for services rendered the succession is a debt against the estate, which must be paid by preference over the creditors of the deceased. *Ib.*
4. In estimating the value of services rendered by attorneys to an estate while under administration, the court will not be governed entirely by the evidence given on the trial of the oppositions thereto, but it will fix such an amount as appears from the nature of the services rendered reasonable and just. *Ib.*
5. Ordinary partners are not bound *in solido* for attorney's fees for services rendered the firm under the employment by one of its members. In such a case each one of the partners is bound for his virile share, if no agreement has been made between the attorney and the partner who employed him. R. C. C. 3872, 3873.

*Hyams v. Rogers*, 230.



**ATTORNEYS AND ATTORNEYS' FEES—Continued.**

6. An exception to the authority of an attorney to bring a suit should not be sustained, if the evidence offered on the trial leaves it in doubt as to whether the attorney was prosecuting the suit without the sanction of his client, because in all cases of doubt the authority of the attorney is presumed. In this case the authority of the attorney to bring the suit was shown. But exception being taken to his authority to prosecute the suit, application was made to the court for a continuance to enable the attorney to procure the testimony of the client, a non-resident, on the point. The court refused the continuance on the ground that the telegram had been shown, purporting to be from the client, showing a change of mind. Held—That the continuance should have been granted, because the telegram, if true, did not make it certain that the client had changed her mind about the suit.

*Succession of Massieu, 237.*

7. An attorney at law who makes a contract with his client for a stipulated amount as his fee for attending to a litigation, can not afterward recover on a *quantum meruit* for services rendered in the same litigation.

*Walker v. Bietry, 349.*

8. An attorney at law who has instituted a suit which is afterward compromised before judgment, can not be permitted to prosecute the suit to judgment for the purpose of enforcing a privilege upon it for his professional services in the case.

*Rind v. Hunsicker, 571.*

9. In this case the Southern Bank had Judge Eustis employed by the year at a fixed salary to attend to its legal business. During the absence of Judge Eustis the bank employed the firm of Waples & Eustis to attend to its business in litigations to which the bank was a party, for which they bring this suit for their fees. The bank offered as defense conversations between the officers of the bank and Judge Eustis, before his departure, showing that during his absence the firm of Waples & Eustis would attend to the legal business of the bank free of charge. Held—That such conversation was in no manner binding on the firm of Waples & Eustis, and that they were entitled to recover their fees from the bank.

*Waples v. Layton, 624.*

**AUCTIONEER.**

1. If an auctioneer has made a sale of property at the request of a curator of a vacant estate, and it turns out that the estate was not vacant, and the sale is afterward declared to be void for want of legal authority to sell, then and in such case the auctioneer has no claim against the estate for the payment of his fees as auctioneer in making the sale, but he must look to the curator or person who employed him for the payment of his fees.

*Succession of Navarro, 105.*

**AUCTIONEER—Continued.**

2. An auctioneer who has property for sale can not recover commissions from the owner unless he has sold it, although the owner may have sold it at private sale before the day on which it was advertised for sale by the auctioneer. He is however entitled to recover from the owner in such a case, any expense which he may have incurred in advertising, making maps, etc.

*Girardey v. Stone*, 286.

3. An auctioneer who sells succession property under an order of court and receives the price therefor, is not a depositary for the purchaser. He can not, therefore, be held liable to the purchaser for the return of the purchase money in case the latter failed to receive the goods purchased, unless it be shown that the purchase money is still in the hands of the auctioneer and is not claimed by any one else.

*Lara v. Nash*, 310.

**BANKS AND BANKING.**

1. A bank is not required to know any of the persons who indorse a check drawn upon it, except the one who presents it for payment, nor is it authorized to withhold payment until it is furnished with direct proof that the signatures of the indorsers preceding the one presenting it are genuine. In cases of this kind the rule is that the bank must know that the signatures of the drawer and the person who presents it for payment are genuine, under penalty of liability to pay it again in case either of the signatures are shown to be a forgery. But if it be shown that the signatures of the indorsers which precede that of the one receiving payment is a forgery, the bank can not on that account be held to a second payment.

*Levy v. Bank of America*, 220.

**BANKRUPTCY.**

1. In a proceeding by the hypothecary action against a third possessor of mortgaged property, who holds it under a sale made by the assignee in bankruptcy, the putting in default is unnecessary.

*King v. Bowman*, 506.

2. The proceeding by the hypothecary action to enforce a mortgage on property which has been surrendered in bankruptcy is not a bankrupt proceeding, and the State courts have jurisdiction to enforce such action.

*Ib.*

3. A mortgagee does not lose his rights of mortgage on property by participating in the bankrupt proceedings, such as voting for an assignee, etc., nor does the sale made by the assignee divest the mortgagee of his right to pursue the property in the hands of the purchaser by the hypothecary action. In such a case the bankrupt court only passes such title as the bankrupt himself could pass.

*Ib.*

**BELLIGERENTS.**

1. During the late war parties residing on opposite sides of the lines of military occupation were prohibited from having any business transactions, or of contracting with each other. But if two parties contracted who both were within the federal military occupation at the time, although residing in different localities, the contract was legal and binding on the parties. *Chase v. Hale*, 255.
2. In this case the evidence shows that the plaintiff had moneys deposited in the Louisiana State Bank to his credit in 1862; that the plaintiff left New Orleans and went into the rebellion soon thereafter. That by a military order issued by General Banks, then in command of the military forces of the United States at New Orleans, plaintiff's moneys were seized in the hands of the bank and paid over into the hands of the quartermaster of the army. Held—That the bank having yielded to a power that it could not resist, in paying over the money of plaintiff to the military authorities, the plaintiff could not require it to make good the loss he had sustained thereby.  
*Grivot v. The Louisiana State Bank*, 265.
3. In 1862, while the city of New Orleans was under the control of the military authorities of the United States, the quartermaster of the army collected from the Merchants' Mutual Insurance Company fifteen thousand dollars, under a threat of punishment under general orders then in force, in case of refusal, this amount being due by the company on a policy of insurance taken for risk on four buildings in the city of New Orleans, belonging to Miss Ida A. Slocomb, which had been destroyed by fire. Miss Ida A. Slocomb brings this suit against the company for the amount of the policy. The company set up as a defense, its payment under the military order to the quartermaster. Held—That payment having been made by the company under a military order, at a time when that authority was supreme and could not be resisted, it operated a full protection to the company, and discharged them from further liability.  
*Slocomb v. Merchants' Mutual Insurance Company*, 291.
4. The purchase of cotton during the late war by parties residing within the Federal lines of military occupation from persons residing within the rebel lines was prohibited by act of Congress. An agent who left the Federal lines of military occupation and went into the rebel lines and there made purchase of cotton which he shipped to the other side, is not therefore entitled to claim or recover from the persons who received the cotton any compensation for his services or to recover any part of the cotton or the proceeds thereof on account of a contract in relation to the purchase of the cotton, because such contract was illegal.

*Irwin v. Levy & Dieter*, 302.

**BELLIGERENTS—Continued.**

5. A person who bought a steamboat from a person within the rebel lines of military occupation during the late war for a certain price in unlawful currency, and afterward sold the vessel to another party within the Federal lines, and received the price in lawful currency, can not be compelled by garnishment process to pay the price he thus received to the original owner, on the ground that the original sale was made in violation of the laws of war, and was therefore void. Nor can the plaintiff recover on the theory that the proceeding was a revocatory action by garnishment, because such action can not be maintained in that form.

*Thompson v. New Orleans, Coast and Lafourche Transportation Company*, 384.

6. In this cause the evidence shows that defendant made a contract with plaintiffs, all residing within the rebel lines of military occupation during the late war, whereby he was, with his steamboat, to transport their cotton from the different plantations where it was then lying, to such other place as the defendant might deem safe from the casualties of the war, for which he was to have one-fourth of all the cotton saved. Defendant performed his part of the contract by transporting large quantities of cotton to other points then deemed safe. But in the progress of the war the cotton thus removed to its new locality fell directly within the lines of active military operations, and was either stolen or destroyed by fire. The owners now bring suit against Wood, the contractor to remove it, either for the cotton or its value. Held—That it being shown that Wood had performed his part of the contract as far as it was in his power; that the cotton was destroyed or stolen by an overpowering force in time of war, which he was unable to resist, he was not legally liable for the cotton, nor its value.

*McCranie v. Wood*, 406.

**BILLS AND PROMISSORY NOTES.**

1. A third holder of a promissory note, indorsed in blank, is not entitled to recover thereon without proving the signature of the indorser. In such a case if the records show that the indorsement on the note was not proved in the court below the cause will be remanded.
- Blum v. Sallis*, 118.
2. An indorsee or holder of a promissory note may recover thereon from the indorser, although the note itself was given for a slave consideration, and its enforcement against the maker is prohibited by article 128 of the Constitution. This right to recover from the indorser is based on the principle that every indorsement of a promissory note forms a new contract between the indorsee and the indorser.
- Succession of Weil*, 139.

**BILLS AND PROMISSORY NOTES—Continued.**

3. In this case the plaintiff gave to his two sons a certain amount of money, which was placed in the commercial firm as the money which they had bound themselves to put into the house, for which a note of the firm was given. The plaintiff now seeks to hold the defendant, a member of the firm, liable as a commercial partner, *in solido*, for the note. Held—That the money for which the note was given being placed in the firm by the plaintiff, as capital which was to be paid in by his two sons, payment of the note could not be enforced against the other member of the firm, the defendant in this case, as an obligation *in solido*.

*Wells v. Siess*, 178.

4. A note given in renewal of one which is secured by a vendor's privilege on real estate is not a novation of the debt, nor is the privilege lost. But if the mortgage has not been reinscribed within ten years, then the vendor's privilege would be postponed to other mortgages of prior date to the reinscription. 2 An. 100.

*Aillet v. Woods*, 193.

5. Drafts given by a judgment debtor to her judgment creditor for various different amounts, and due at different stated times, which are accepted by the drawee, which, when paid, are to operate an extinguishment of the judgments, operate a full and complete extinguishment of judgments, whenever the judgment creditor disposes of or uses the drafts for his own benefit, and in such case the judgment debtor is entitled to an injunction restraining the judgment creditor from further proceeding on the judgments.

*Woolfolk v. Degelos, Durrive & Co.*, 199.

6. In a suit by the holder of a promissory note against the executor of the maker, the latter has the right to show in defense that the note was given without any consideration, and that the contract for which it was given was a simulation. In this case the evidence shows that the note was given for the sale of two-thirds of the steamer *Fanny Fisk*, and that there was in reality no sale of the *Fanny Fisk*, but that it was a mere simulation. Held—That the plaintiff, the holder of the note, could not recover from the estate of the maker of the note, because there was no valid consideration given for the note.

*Woods v. Schlater*, 284.

7. The holder of a promissory note who wishes to hold an indorser thereon, must give him notice of the failure of the drawer to pay at maturity.

*Marks v. Herman*, 335.

8. A person who is bound unconditionally on a promissory note, is not entitled to notice of non-payment by the drawer. *Ib.*
9. If an indorser on a bill of exchange, or a promissory note, be discharged from liability because the holder has failed to give

**BILLS AND PROMISSORY NOTES—Continued.**

- the proper notice, then the indorser can not thereafter be held liable, unless it be shown that he has, subsequently to his discharge, assumed the payment. *Gayarre v. Sabatier*, 358.
10. A due bill for a certain amount given to secure payment of a shipment of cotton from the Red River to New Orleans at so much per bale—the number of bales to be ascertained after the boat arrives at New Orleans—can only be enforced for the number of bales actually carried at the rate agreed on. *Cushing v. Jacobs*, 463.
  11. If a note has been offered in evidence by the defendant to show its payment, and has been rejected on the ground that it is not sufficiently proved, then parol evidence is admissible as the next best evidence to prove that it has been paid. *Dull v. Gordon*, 478.
  12. Parties holding an obligation, who have received payments thereon in confederate notes and given credit therefor, are bound by their acts, notwithstanding such notes are not a legal tender in payment of debts. The settled doctrine in all such cases is, that the courts will leave the parties where their conduct has placed them. *Ib.*
  13. A second note given by the husband after the dissolution of the community by the death of the wife, in renewal of a note which he had given before the dissolution of the community, is not a novation of the first note, and the heirs of the deceased wife have no mortgage on their mother's share of the community property which they can urge as against a creditor who is seeking to enforce payment of the last note by seizure of the property which belongs to the community. *Turner v. O'Neal*, 543.
  14. The plea of prescription against a note, based on the ground that the previous note for which it was given in renewal was prescribed at the time it was given, will fail if the evidence does not disclose the date of the first note. *Ib.*
  15. Where the principal and the surety on a promissory note reside in another State at the time of the making of the note, and the principal afterward removes to Louisiana, and the surety is compelled to pay the note where it was made, the surety can recover from the principal obligor in this State the amount which he has paid. *Long v. Templeman*, 564.

**CITATION.**

1. An action to annul a judgment for want of citation can not be maintained, if it be shown that the person cited and the person who demands the nullity of the judgment are one and the same person. *Neidhardt v. Hunterheimer*, 174.
2. The fact that the defendant has been cited by a different surname than his own will not avail, if it be shown that some called him by the name under which he was cited. *Ib.*

## CITATION—Continued.

3. A citation issued by the Provisional Court of the United States, for the State of Louisiana, if served on the defendant before the war between the United States and the so called Confederate States had been declared at an end by the political department of the government, operated an interruption of prescription in favor of the plaintiff.  
*Levi v. Weil*, 223.
4. A judgment that has been rendered without legal citation is legally void, and any person having the least interest therein, may show such nullity wherever and whenever it is sought to be enforced.  
*Walworth v. Stevenson*, 251.
5. In attachment proceedings the forms of citation prescribed by the law maker must be strictly observed under penalty of nullity.  
*Ib.*
6. A purchaser under a judicial sale is in bad faith, and is liable for rents and damages, if the judgment under which he purchases is absolutely void for want of citation.  
*Ib.*
7. A citation served upon a person other than the defendant, who is only transiently at the domicile of the defendant and does not reside there, is fatal, and a judgment rendered thereon is absolutely void.  
*Lewis v. Smith*, 617.

## CLERKS.

1. A clerk or bookkeeper employed in a store by the year who has been discharged before the term of his employment has expired, for good and sufficient cause, can only recover wages up to the time of his discharge.  
*Griffin v. Haynes*, 480.

## CLERKS OF COURTS.

1. A clerk of one of the district courts of the parish of Orleans has not such interest, either as clerk of the court or as a citizen and taxpayer, as will authorize him to invoke the writ of mandamus to regulate the jurisdiction of the several courts of the parish. The clerk of a court can not, therefore, obtain a mandamus against the Administrator of Finance, compelling him to bring suits in his court against delinquent taxpayers, although the court of which he is clerk alone has jurisdiction of such suits when brought. The question as to whether suit is to be brought, is left to the discretion of the officers having control of the finances of the city.  
*State ex rel. Byerly, Clerk of the Third District Court, v. Walton, Administrator of Finance*, 115.
2. The clerk of the district court who has been suspended from exercising the functions of his office by the judge of the court has the right to have the legality of such order reviewed on appeal, and a mandamus will issue on application of the clerk, commanding the judge to grant an appeal.  
*State ex rel. Durapau v. Judge of Fourth Judicial District Court*, 610.

## CONTEMPT OF COURT.

1. The Supreme court is vested with power to issue the writ of habeas corpus in a case where a party to a suit before a district court has been imprisoned by the judge for a contempt of court, if the amount in dispute in the main action is sufficient to give it jurisdiction of the appeal, provided the contempt is connected with or grows out of the main action.

*State ex rel. Van Norden v. Sauvinet, Sheriff*, 119.

2. A contempt of court is an offense against the State, and not an offense against the judge personally, and therefore the order of the judge inflicting punishment for such contempt comes within the range of the pardoning prerogatives vested by the constitution in the Executive. *Ib.*

3. Article 620 of the Code of Practice makes it obligatory upon the clerks of the district courts in cases where mandates and decrees from the Supreme Court have been presented for execution to at once, and without any order or decree from the judge *a quo*, issue the necessary process to execute the judgment of the Supreme Court. A refusal or failure on the part of the clerk to comply with this article of the Code of Practice in any case where he has been required to do so, will subject him to punishment for contempt by the Supreme Court, for disobedience to the mandates of the law.

*State ex rel. Bovee v. Herron*, 619.

4. Under this article of the Code of Practice the judge of the district court has nothing to do with the execution of the orders and decrees of the Supreme Court. Therefore, if a judge of a district court interferes with or obstructs, or hinders in any way, as judge, the execution of a judgment of the Supreme Court, he will be held guilty of a contempt of the authority of that court, and the plea of ignorance of the provisions of this article will not shield him from the penalties denounced against those who obstruct the execution of the mandates of this tribunal. *Ib.*

## COMITY OF NATIONS.

1. The comity of nations has well nigh the force of a rule of international law in private matters (*jus gentium privatum*). It is not the comity of courts but the comity of nations which authorizes the administration of foreign laws within the limits of another sovereignty; and, subject to certain familiar limitations, the courts have no discretion in the matter.

*Tyree & Co. v. Sands & Co.*, 363.

2. As a general rule a personal contract, with its attendant privileges and effects, when made in another State, will be enforced in Louisiana upon movables according to the *lex loci contractus*, provided such enforcement be not contrary to our policy, and does



## COMITY OF NATIONS—Continued.

not violate the order of priorities established by our laws, and does not injure the rights of our own citizens; and provided further, that we have by our own law, *lex fori*, the remedy which is asked. *Ib.*

3. The plaintiffs in April, 1869, having by the laws of Alabama a vendor's lien on cotton superior to that of the intervenors as pledgees, and it appearing that all parties were citizens of and made their contracts in Mobile; that an identical pledge was provided in New Orleans; and that a sufficient remedy existed by the law of Louisiana. Held—That the courts of Louisiana would enforce such vendor's lien upon the cotton sequestered in New Orleans. *Ib.*
4. There can be no imprudent confidence in trusting one's property to the guardianship of the law. *Ib.*
5. The plaintiffs having their lien, and the intervenors knowing the law and having it in their power to know the facts, the latter can not invoke against the former the rule that "as between two innocent parties the loss should fall on the one whose imprudent confidence has enabled the wrong-doer to get credit." *Ib.*

## COMMON CARRIER.

1. In this case the vessel cleared at the port of Boston for the port of New Orleans, with a cargo for the latter place. While on her voyage she encountered a storm at sea, by which a portion of her cargo was damaged. The consignee at New Orleans brought suit against the vessel for the damage done to a lot of furniture on board. Held—That it being shown by the bill of lading that any damage done to the cargo, or any portion thereof, from accident of machinery, boilers, or dangers of the seas of any kind were excepted, and the damage in this case was caused by a storm at sea, that it was therefore incumbent on the plaintiffs to show affirmatively, to enable them to recover, that the damage was caused by the fault or negligence of the carriers.

*Kelham v. Steamship Kensington*, 100.

2. A common carrier who undertakes to carry freight from one point to another is responsible for the delivery of the goods at the port of destination. A mere notice by the carrier to the consignee, that his goods are landed, is not sufficient to discharge the carrier in case of loss.

*Maignan v. New Orleans and Jackson Railroad Co.*, 333.

## COMMISSION MERCHANT.

1. A commission merchant who has made advances to a planter, under an agreement that the latter is to ship his entire crop to the merchant, and the planter ships a portion of his cotton to another merchant, then and in that case the merchant who made

## COMMISSION MERCHANT—Continued.

the advances may recover from the planter the usual commissions which he would be entitled to charge on the part of the crop shipped to other parties. *Thornhill v. Picard*, 159.

2. A commission merchant, who has received a lot of cotton on consignment from the tutor as the property of the minor, can not appropriate the proceeds thereof to the payment of a debt or obligation due him by the tutor. In such a case the proceeds of the sale of the cotton or its value, as shown at the time it was received, belonging to a minor may be recovered from the merchant, less the expenses incurred in shipping and selling it, even though the merchant show that the cotton was shipped in the individual name of the tutor, and that the tutor was indebted to him, on his own account, in an amount above the proceeds of the sale of the cotton. *Succession of Norton*, 218.
3. Commission merchants in the city of New Orleans who receive cotton as agents and fail to obey or follow the instructions of the shipper incur a liability to the owner for its value. *Copes v. Phelps*, 562.

## COMMUNITY.

1. A surviving widow has the right to mortgage her half of the estate of her husband after the community is dissolved by his death, and the mortgagee has the right to enforce such mortgage, although the estate has not been finally settled, and the rights of the community have not been fully ascertained. In such a case the wife who is the executor of the estate can not, in her individual capacity, maintain an injunction to stay the sale of her interest in the community thus mortgaged, on the allegation, without proof, that the estate is largely indebted for which the community is bound. *Hickman v. Thompson*, 264.
2. Real property in the name of a married woman belongs to the community, and she can not maintain a petitory action to recover it without alleging and showing that she has acquired the community interest in the property since its dissolution. *Sulstrang v. Betz*, 295.
3. In this case the community property of the succession was sold on the motion of the creditors to pay their debts. The purchasers failed to comply with their bids, and the creditors moved to have it again sold at their risk. In answer to the rule against the purchasers, they alleged that the deceased left three daughters by a former marriage, who claim to be the owners of one-half of said property as the heirs of their mother, who is dead. It not appearing that the mother of these parties was dead, and the property being community, the rule was made absolute, and the purchasers appealed. Held—That it was incumbent on the defendants in the

**COMMUNITY—Continued.**

rule to show that the mother died since the acquisition of the property, and that the debts for which it was sold were contracted since her death. *Succession of Williams*, 431.

4. In this case the wife died, leaving an estate consisting of the community with her husband, who took charge of it without any formal administration other than that of having an inventory taken. The surviving husband continued to manage the entire estate as his own property up to the time of his death, some years thereafter, and contracted debts with commission merchants and others. After his death the heirs instituted suit against his estate for their interest in the succession of their mother. The creditors intervened and claimed to be paid first, on the ground that their debts bore against the community. Held—That the husband having taken possession of the entire estate, without any formal authorization, and used it as his own up to his death, his estate was bound for all debts which existed against the community at the time of its dissolution by the death of the wife. Held further—That the heirs can only claim against the creditors the residuum after they are paid. *Sadler v. Kimbrough*, 534.

**CONSTITUTIONAL LAW.**

1. A law will not be declared unconstitutional unless it be clearly so. The decisions by the Legislature of a question of public policy will not be revised by the courts.

*State ex rel Hernandez v. Flanders, Mayor*, 57.

2. Article 132 of the constitution, which provides that "all lands sold in pursuance of decrees of courts shall be divided into tracts of from ten to fifty acres," is not self-acting, and can only have effect in the manner and to the extent provided for by statute.

*Bowie v. Lott*, 214.

**CONTRACT.**

1. Contracts legally entered into have the effect of laws on the parties who have formed them. *Bietry v. City of New Orleans*, 21.
2. An agreement made between the city of New Orleans on the one side and a contractor on the other, whereby the city reserves the right to discontinue and annul the contract, whenever it shall appear that the contractor has failed to comply with the terms and conditions of the contract, may be annulled and set aside by the city without putting the contracting party in default, if it be shown that he has failed to comply with the terms and conditions imposed upon him by the contract. *Ib.*
3. A party who has contracted with another on an immoral basis, or has made a contract which is reprobated by law, can not, after it has been executed, obtain relief from its effects through the action of the courts. *Dean v. Martin*, 103.

## CONTRACT—Continued.

4. One who has induced others to buy a lot of cotton from a third person, by representing that such third person was the owner thereof, is thereafter estopped from setting up any claim thereto on his own account. *Ib.*
5. The gratuitous investiture by the State, in a municipality, of the administration of a public ferry, with the right to collect and enjoy the revenues arising therefrom, is not a contract between the State and such municipality, and the State may, therefore, through her legislature, at any time, resume the control of such ferry herself or vest it elsewhere. The doctrine in the case of police jury of Bossier v. Shreveport, 5 An. 661, is reaffirmed by this decision. *Marks v. The Town of Donaldsonville*, 242.
6. A person who has contracted with another to run a gin, can not recover damages from his employer who has discharged him before the contract expired, for a just cause, such as a failure to discharge his duties properly. An agent who contracts without authority from his principal binds himself. *Hewitt v. Roubeshush*, 254.
7. A marriage which has been declared to be null on account of an impediment in the way of one of the spouses, has nevertheless its civil fruits as to the other party who was in good faith and contracted the marriage in ignorance of the disabilities which affected the other, and also in favor of the issue of such marriage. C. C. 118. Good faith in contracts being always presumed, the burden of proof falls upon the party who alleges fraud or bad faith. A wife who contracted a marriage with her husband in Louisiana in good faith, can not, therefore, be deprived of her interest in the succession of her husband, because it is afterward established that her husband at the time was the husband of a woman in the kingdom of Italy, by a marriage which took place prior to her marriage in Louisiana, nor can her children, the issue of such marriage, be deprived of their inheritance from their father's estate on that account. *Succession of Navarro*, 298.

## CORPORATIONS.

1. A corporation which is invested with the power of assessing taxes and licenses, has the right to enforce their payment by judicial proceedings. *Amite City v. Clements*, 27.
2. There is a wide difference between the funds and franchises of a political corporation and those of a private person. *State ex rel. Hernandez v. Flanders Mayor*, 57.
3. The charter of a municipal corporation is not a contract (but a mandate) and the Legislature has the right to regulate and control the corporation and its funds and franchises, because the whole interest and franchises are given for the public use and advantage. 5 An. 661. *Ib.*

## CORPORATIONS—Continued.

4. By section forty of the act of 1870, chartering the city of New Orleans, the city was directed to fund its floating debt, and by the act No. 103 of 1871, it was directed to include in the statement thereof all registered certificates and bills issued or approved (under the former charter) by the chairman of the "Committee of Finances" and registered by the Controller or his deputy, which at the time of presentation for payment or redemption as part of the floating debt were held and owned by *bona fide* purchasers for value; and such holders were authorized to enforce their rights in this regard by mandamus, and pending proceedings by mandamus were confirmed. *Ib.*
5. It appearing that the relator was the *bona fide* holder for value of a certificate of this sort, signed by the chairmen, who had the legal authority to *sign it*, and duly registered, and that as to this particular certificate there was no sufficient proof of fraud as between the committees and the parties to whom it was originally issued. Held—That the legislation quoted above cured any informalities prior to such signing and issuance; that the question whether the *bona fide* purchaser of the certificate should suffer, or the city should pay a claim thus certified by her proper officers, was one of public policy within the legislative discretion, and that the relator was, therefore, entitled to a mandamus. *Ib.*

## CRIMINAL LAW AND CRIMINAL PROCEEDINGS.

1. In a criminal trial on the charge of shooting at another, who was in pursuit of the accused, evidence showing that the person shot at was the sheriff of the parish at the time, is admissible to show that such person was in the peace of the State at the time of the shooting. *State v. Denkins, 29.*
2. In all criminal prosecutions in which the punishment at hard labor is twelve months or more, the accused is entitled to twelve peremptory challenges to the jurors chosen to try the cause, and in like manner the State is entitled to six peremptory challenges in each prosecution. Revised Statutes of 1870, section 998. *State v. Earle, 38.*
3. In case, therefore, that more than one accused has been put on trial for the same offense in the same indictment, the State will not thereby gain the right of peremptory challenging more than six jurors, who have been chosen to try the cause. *Ib.*
4. Persons on trial on a charge of burglary have the legal right to confront the witnesses who appear against them face to face. An examination by the jury under an order of the court of the place or house where the crime is alleged to have been committed, away from and out of the presence of the accused, while the trial is going on, is a violation of this right, and the ruling of the judge

## CRIMINAL LAW AND CRIMINAL PROCEEDINGS—Continued.

*a quo* directing the jury to retire to such place and make the examination out of the presence of the accused, will be reversed on appeal, and the cause will be remanded to the court *a qua* for a new trial.

*State v. Bertin and Capdeville*, 46.

5. The phrase "with malice aforethought" is not sacramental in an indictment for a statutory offense, where the accused is charged with feloniously and maliciously, while lying in wait, shooting his victim, with the intent to commit murder.  
*State v. Forney*, 191.
6. In such a case, Held—That the accused not being charged with having committed at one time, two offenses, whose combination creates a capital offense, it is not necessary to define the offense of murder, but that the idea of malice aforethought is necessarily implied in the use of the word "murder." *Ib.*
7. The fact that one of the jurors is allowed to leave the court room for a necessary purpose, who returns before the panel is complete, or any evidence has been given, is not such a separation of the jury as will vitiate the verdict. *Ib.*
8. The continuance of a criminal trial can not be claimed by the accused a second time on the ground of the absence of counsel.  
*State v. Dubois, Cambre and Coming*, 309.
9. In a criminal case, the punishment of which is not capital, the jury may be allowed to separate after they are empaneled. *Ib.*
10. In a prosecution for retailing spirituous liquors without a license it is sufficient if the indictment charges the person with retailing spirituous liquors without first obtaining a license therefor, without specifying the person to whom it was sold, or the quantity sold.  
*State v. Kuhn*, 474.
11. Where authority has been given to the parish by the Legislature to impose a license upon persons who are engaged in retailing spirituous liquors, the indictment for retailing spirituous liquors without first obtaining a license therefor, need not show affirmatively that the parish had the right to impose such license. *Ib.*
12. An indictment for the crime of murder is sufficiently explicit to advise the accused of the charge against him if it charges "then and there did feloniously kill, slay and murder," without containing the words "with malice aforethought."

*State v. Phelps*, 493.

## DAMAGES.

1. In the rule that "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it" (R. C. C. 2315), the phrase "every act" is controlled by the word "fault," and it results that the party bound must be in fault, that

**DAMAGES—Continued.**

is to say, his conduct must be, in the general sense of the word, unlawful. No one can be held liable for the regular and prudent exercise of a right that belongs to him (L. 55, *ff. de reg. juris*), and he alone causes a legal injury who does what he has no right to do. (L. 151, *ff. de reg. juris*.) The defendants, owning a short railway, from New Orleans to Lake Pontchartrain, and one Morgan, owning a line of steamers plying from the Lake terminus to Mobile, and the plaintiffs and other parties owning two other steamers in the same trade, an arrangement was made by defendants with Morgan, and temporarily, with the proprietors of the other steamers, respectively, to share *pro rata* the through freight from New Orleans to Mobile. It appeared that this arrangement was unprofitable to the defendants, for the lines of steamers, by competing and lowering the rates of freight, greatly reduced the share coming to the railway. The defendants therefore entered into an agreement with Morgan by which the latter loaned them \$250,000, and the former agreed to pro rate with him the through freight from New Orleans to Mobile, and to charge all other steamers the tariff rates paid by the public generally. The plaintiffs immediately laid up their steamer and sued for damages, on the ground that this pro rating with Morgan and refusing to further pro rate with plaintiffs was an illegal combination with Morgan to confer on him an unlawful monopoly and preference.

*Eclipse Towboat Company v. Pontchartrain Railroad Company*, 1.

2. Plaintiff sued defendants as partners in the building business for damages resulting from the failure on their part to comply with their contract in erecting a building. The evidence showed that the defendants were not partners at the time the contract was made, and the contract was made with only one of the defendants. Held—That the defendants not being partners at the time the contract was made, the plaintiff could not recover from the partnership the damages resulting from its violation. *Noble v. Trost*, 84.
3. A claim for damages which is made in a suit to enjoin the sale of property on the ground that the seizure was illegal, unsupported by evidence on the trial, will not be considered in estimating the amount necessary to give the appellate court jurisdiction of the appeal. *Michoud v. Nolan*, 117.
4. A claim for damages that is unliquidated, can not be pleaded against a liquidated and established debt. *Pike v. Wells*, 203.
5. A reconventional demand for damages for the wrongful suing out of a sequestration, can not be set up by the defendant where the parties reside in the same parish. Nor does the law authorize the imposition of such damages in any case on the setting aside of a sequestration. *Nuzum v. Gore*, 208.

## DAMAGES—Continued.

6. The State courts can not enforce an admiralty lien given by law for the recovery of damages for a maritime tort; and an attachment will not lie where the claim is for damages *ex delicto*. 22 An. 388.  
*De Harde v. Bark Magdalena*, 267.
7. A master in command of a vessel is not liable for the damages which his vessel has done to another by a collision if he was not on board of his vessel at the time of the collision. *Ib.*
8. A person owning a horse and buggy is not responsible to another for the damage caused by his horse running away with the buggy and running against another horse and buggy, if the running away of his horse was not caused by his carelessness or negligence, but was caused by some other person or agency over which he could exercise no control.  
*Shawhan v. Clarke*, 390.
9. A dry goods merchant who has engaged the services of a clerk to aid in carrying on his business is not liable to an action in damages by his clerk for simply taking a partner in the business, nor is he liable to such action because he has changed somewhat the character of his business from that of a wholesale notion store to that of a wholesale dry goods store. A clerk who has quit his employer under such circumstances without showing any good cause therefor can recover neither wages nor damages.  
*Levy v. Friedlander*, 439.
10. In a damage suit, if the verdict of the jury is not supported by the evidence, it will be set aside on appeal, and judgment will be given for such amount as the evidence sustains.  
*Haselmeyer v. McClellan*, 629.

## DEDICATION TO PUBLIC USE.

1. This suit is brought by plaintiff to recover from the city of New Orleans certain parcels of ground which it is alleged the city has taken possession of for the use of public streets and highways. The evidence offered on the trial shows that for more than thirty-two years prior to the institution of this suit the plaintiff has enjoyed the lands owned by him by a regular chain of title, and that during that long period of time he has never set up any claim or ownership to the parcels taken and occupied by the city for the public use, but on the contrary has been content with the limits to which the occupancy of the city had restricted him. That he has sold many of the lots and portions of ground owned with reference to the boundaries and measurement of the streets taken by the city. Held—That the plaintiff having adopted the plan of the city for the boundaries and measurement of the lots, and having acquiesced therein for a period of thirty-two years, with a full knowledge of all the facts, he is bound thereby, and



## DEDICATION TO PUBLIC USE—Continued.

from his selling lots with reference to the plan of the city his purpose to dedicate is fairly inferred. Held further—That plaintiff can not now recover on the ground that a formal dedication is not shown. *Arrowsmith v. The City of New Orleans*, 194.

## DEPOSITARY.

1. A depositary who sells sugar deposited with him and converts the proceeds to his own use is responsible to the owner for its value.

*Short v. Lapeyreuse*, 45.

2. If it be shown, in a suit for the value of the sugar, that the depositary received it, then the burden of showing what became of it falls upon him. *Id.*

## DISTRICT COURT, PARISH OF ORLEANS.

1. The terms of the district courts of the parish of Orleans are fixed by law to commence on the first Monday of November and continue until the fourth day of July. Citation of appeal, if made in open court during the term as fixed by law, is not necessary. A plaintiff can not stand before a court demanding the nullity of a judgment, and at the same time claim the proceeds of the sale of property made under it. This is the rule, whether the property sold be movable or immovable. *Blessey v. Kearny*, 289.

## DIVORCE.

1. A judgment of divorce *a vinculo matrimonii* rendered on a rule taken by one of the parties on a judgment of separation from bed and board, is absolutely null and void if the opposing party has not been cited nor has appeared to defend the suit.

*Jurgielewicz v. Jurgielewicz*, 77.

## DISTRICT ATTORNEY.

1. The district attorney of a district may, in case of refusal, be compelled by mandamus to bring a suit under the intrusion act to test the right to an office. *State ex rel. Rills v. Lynch*, 23 An. 786; *Hayes v. Thompson*, 21 An. 656. *Berhil v. Fisk*, 149.

## DONATION.

1. In an action by the heir to annul a disguised donation, on the ground that it was made by the deceased to a person interposed, the plaintiff must show with legal certainty that the purchase money was not the donee's, or that the transactions were really donations from the donor to the person interposed.

*Veazie v. Stokes*, 229.

## EVIDENCE.

1. Evidence offered and received without objection, showing that an account against the city of New Orleans has been approved by one of the finance committees in accordance with the requirements of the city, must, in the absence of countervailing proof, be taken as establishing the demand. *Greuling v. City of New Orleans*, 28.

## EVIDENCE—Continued.

2. The testimony of one witness to the correctness of an account, above five hundred dollars, is sufficient to confirm a judgment by default. 4 Rob. 258; 10 An. 270. *Webster v. Burke*, 137.
3. In considering the rulings of the judge *a quo* on the objections made to the admissibility of testimony, the appellate court will be guided by the bills of exceptions taken to his rulings on the admissibility of a certified copy of the recorder of an abstract, showing the wife's claim against her husband, on the ground that the oath attached to the instrument was made before a notary public who was incompetent to administer an oath in such a case; and if the certificate shows also that the notary was a justice of the peace, then the presumption is that the officer administered the oath in his proper capacity and the document is not inadmissible on that account. *Whittington v. Whittington*, 157.
4. In an action to set aside a sale of a lot of cattle, on the ground that it was fraudulent, the vendor being in insolvent circumstances at the time, evidence to show the insolvency of the vendor is inadmissible against the purchaser unless it be alleged that the purchaser was aware of the insolvency at the time of the sale. *Levyson v. Ward*, 158.
5. The burden falls upon the defendant when he has made the special plea of payment of establishing the fact by legal proof. *Browder v. Hook*, 200.
6. The action to compel parties to reimburse what has been paid for them on account of the purchase of lands is only prescribed by ten years. *Ib.*
7. In a suit to annul and cancel a retransfer of real estate, on the ground that a retransfer was procured through the fraudulent representations of the vendor, parol evidence is admissible to prove the fraud. *Thomas v. Kennedy*, 209.
8. The testimony of a defendant who has given evidence at the request of the plaintiff, may be contradicted or overcome by other testimony, the same as that of any other witness. *Ib.*
9. The admission by the defendant in the answer, that the plaintiff acquired the notes sued upon, by the indorsement in blank of the payee, is sufficient proof of the signature of the indorser. *Moore v. Polk*, 216.
10. A defendant who alleges that the consideration of the obligation on which suit is brought grew out of an illicit transaction between himself and the plaintiffs, in order to succeed in his defense, must support his allegations by clear and undisputed evidence. The doctrine in the case of *Weaver v. Anfoux*, 20 An. 1, is reaffirmed by this decision. *Babeock v. Watson*, 238.
11. Where an appeal in a suit by a creditor of the husband attack-

**EVIDENCE—Continued.**

ing the judgment of his wife against him, parol evidence is held admissible to prove that the husband received funds belonging to the wife, and the case is remanded for the purpose of admitting the same, it can not be excluded on the second trial, on the ground that there is written evidence of the fact.

*Keller v. Vernon*, 280.

12. Parol evidence that has been offered by the creditor and received by the judge *a quo* without objection, to prove that a third person has promised to pay his debt, will be disregarded by the Supreme Court in examining the case on appeal. *Levy v. DuBois*, 398.

13. If two witnesses testify to a verbal contract of lease, one being a party to the lease and the other not being a party, and has no interest in the lease, and their testimony is conflicting, in such case the weight of the evidence will be given in favor of the witness who has no interest in the result of the suit.

*Mathilde v. Levy*, 421.

14. The burden falls upon the person who objects to the admission of a certified copy of a mortgage in evidence, on the ground that the original did not contain the required amount of internal revenue stamps upon it, of showing that the stamps were not upon it at the time it was recorded. In the absence of such proof the presumption is that the recorder required the necessary stamps to be affixed before he recorded the act. *Grand v. Cox*, 462.

15. Any acknowledgment or agreement equivalent to an acknowledgment of a debt by a person who is dead at the time it is sought to be established, must be proved by written evidence.

*Boswell v. Roby*, 496.

16. A party who obtains a commission to take the testimony of witnesses named, is not bound to take the depositions of all the witnesses named in the commission, under penalty of the exclusion of the testimony of those which have been taken.

*Bramstein v. Crescent Mutual Insurance Company*, 589.

17. The testimony of the clerk of the court and the attorney for plaintiff is admissible to show that the commissioner who took the testimony failed to annex the commission to the testimony before returning it into the clerk's office. *Ib.*

18. Notes which have been stamped with the required internal revenue stamps, are admissible in evidence without the stamps being canceled as required by law. *Browne v. Bennett*, 618.

**EXECUTORS AND ADMINISTRATORS.**

1. An executor cannot bind the estate he represents by the acknowledgment of a debt which is already prescribed, nor can he bind the estate by giving a new note in the place of one already prescribed. *Dickson v. The Succession of Compton*, 82.

## EXECUTORS AND ADMINISTRATORS—Continued.

2. In this case the wife became the executrix of her deceased husband's estate, and placed herself on the tableaux, filed by her, as a creditor for the amount of her judgment against her husband. This item on the tableaux was opposed by the creditors on the ground that the judgment was void because it had not been executed. Held—That it being shown by the record that the judgment of the wife against her husband had never been executed, and that no proper effort to execute it had ever been made; that, therefore, it was absolutely void, and not properly placed upon the tableaux as a debt against the succession. In the same tableaux the executrix refused to place a judgment against her husband upon the tableaux as a creditor, on the ground that it involved a slave consideration. The record of the case in which the judgment was rendered being introduced showed that the plea of a slave consideration had been made, but the proof offered failed to establish it. Held—That the judgment was properly ordered by the judge *a quo* to be placed upon the tableaux as a debt against the succession. *Succession of James, 134.*
3. A dative testamentary executor will be removed from office, if it be shown that he has disobeyed the orders of the court directing him to file an account within a given time, or that he has otherwise neglected or refused to discharge the duties imposed upon him as testamentary executor. *Brown v. Ventress, 187.*
4. In this case the executors procured an order from the probate court to sell the property composing the succession of William Silliman solely for account of the succession. At the sale the widow in community was present, and bought more than one-half of the property. Plaintiff bid for a portion of the property, but failing to comply with the terms of his bid, and after being put in default the executor reoffered it for sale at his risk. To this second offering by the executors plaintiff prayed an injunction, on the alleged ground that the executors had failed to give him a title by procuring the signature of the widow to the act of sale, the property being owned in community with her, and only sold as the succession property of her husband, William Silliman, deceased. Held—That the widow in community being present at the sale and making no objection thereto, and having purchased a large portion of the property, she was by her own acts, concluded from thereafter making any objection to the validity of the sale, or of setting up any right or title to the property bought by the plaintiff, and that plaintiff was not, therefore, entitled to the injunction claimed on that account. That the widow having participated in the sale, she had ratified the same, and any further ratification was unnecessary on her part. That finally, the sale

**EXECUTORS AND ADMINISTRATORS—Continued.**

was valid without her signature to the act. Held further—That the attorney's fee for dissolving the injunction may be assessed against the plaintiff as damages for wrongfully suing out the same.

*Davidson v. Silliman*, 225.

5. A dative testamentary executor who has filed his final account and obtained his discharge, can not afterward represent the estate in any suit or controversy between the legatees about the rents and revenues of the estate while under his administration.

*Norris v. Collins*, 293.

- 6 An executor is accountable to the heirs for the rents which he is able to collect from the estate which he is administering; and he is entitled to charge the estate for necessary improvements which he places upon the property, which property must be compensated with rents that he has collected.

*Succession of Henderson*, 435.

7. An heir who has provoked the appointment of himself as provisional administrator of the estate of his mother, on the allegation that the succession required immediate administration, can not be held and treated as an intermeddler in the estate.

*Gooch v. Gooch*, 465.

8. If the evidence shows that loss has occurred to the succession by the gross carelessness of the executor, and that his administration, instead of being beneficial, has been injurious to the succession, the executor will not be allowed commissions. 4 An. 578.

*Succession of Liles*, 490.

9. To entitle the surviving widow to the one thousand dollars under the homestead act, it must be shown affirmatively that she is in necessitous circumstances.

*Ib.*

10. Suits brought by attorneys before the death of the client may be prosecuted by the same attorneys after his death, notwithstanding one of the attorneys may become his executor, and all the privileges accorded by law on judgment obtained or property seized as security for the attorneys' fees will attach in favor of such attorneys.

*Ib.*

11. An executor who is a professional man is not permitted to charge for legal services which he has rendered the estate while under administration.

*Ib.*

12. A dative testamentary executor has the right to bring suits to preserve the property of the estate he represents, in any parish of the State, without reference to his own domicile.

*Coleman v. Baker*, 524.

13. A creditor of a succession who accepts notes and obligations in favor of the estate as collateral security to collect and apply to his debt must, in order to escape responsibility, collect them, or show

**EXECUTORS AND ADMINISTRATORS—Continued.**

the causes which prevented him. By a failure to collect such notes or show any good reason why he did not do so, the amounts will be charged to him by the executor, and if the amount is equal to his claim against the estate, compensation takes place, and as he is no longer a creditor he can not oppose the account of the executor. *Succession of Liles, 550.*

**EXECUTION.**

1. Execution may issue against one of several debtors condemned *in solido* to pay the same debt, without issuing it against the others, at the option of the judgment creditor. *Michel v. Benner, 287.*
2. An *alias fieri facias* can not issue where an injunction has been granted restraining the plaintiff and the sheriff from executing the original *fieri facias*, and if a second *fieri facias* has improvidently issued, the proper action of the court *a qua* is to quash it. *Byrne v. Mithoff, 297.*

**EXECUTORY PROCESS.**

1. Objections to the legality of notice of seizure in a proceeding under an order of seizure and sale, must be urged within five years from the date of the service of such notice. Act of tenth of March, 1834, page 123. *Succession of Allan v. Couret, 24.*
2. The act of the General Assembly authorizing the parish judges to grant orders of seizure and sale, in the absence of the district judge, is constitutional. *Ledoux v. Ducote, 181.*
3. An order of seizure and sale granted by a parish judge, in the absence from the parish of the district judge, on sufficient and authentic evidence is therefore obligatory and binding upon the parties in interest. *Ib.*
4. The only question that can be examined on an appeal from an order of seizure and sale is had the judge *a quo* sufficient authentic evidence before him to authorize the issuing of the writ. Costs incurred in protesting a mortgage note are regulated by law, and must be taxed as such by the court that issues the order of seizure and sale, and authentic evidence of such costs is not therefore essential. *Umrich v. Grow, 308.*
5. In case of an appeal from an order of seizure and sale, the only question that can be examined by the appellate court is the sufficiency of the evidence before the judge *a quo* to authorize the issuing of the writ. *Fazende v. Flood, 425.*
6. Costs incurred in protesting a mortgage note should be taxed as such by the judge who issues the order of seizure and sale on the note, and authentic evidence thereof is not essential. *Ib.*

**FRAUD.**

1. He who alleges simulation must prove it. Under an allegation of

**FRAUD—Continued.**

simulation merely, of a mortgage, evidence that it is fraudulent but real, will not be admitted if objected to.

*Brewer v. Gay*, 35.

2. A. D. Kelly granted a mortgage in favor of Dr. J. C. Patrick, or any future holder of certain notes which he had given, on real estate in the city of New Orleans to secure their payment. The mortgaged property was afterward sold under judicial process by other and subsequent mortgage creditors. This suit was then brought by the other and subsequent mortgage creditors to cancel the mortgage given in favor of Patrick or any future holder or holders of the notes, and to have the proceeds applied to the payment of their mortgages by preference, on the ground that the mortgage given in favor of Patrick was simulated and fictitious. Held—That the mortgage creditors having alleged merely that the mortgage in favor of Patrick was simulated, and having failed to establish the simulation by proof, they could not be permitted to show that it was fraudulent, set it aside on that ground, and claim the proceeds of the sale for the benefit of the junior mortgages.

*Ib.*

3. The payee of promissory notes, given for the price of a plantation, is not guilty of fraud in making a compromise with the holder thereof, whereby he obtains a reduction of the amount predicated on a depreciation of value on the property sold, on account of the casualties resulting from a state of war. *Vinson v. Vives*, 336.
4. Where the wife has died after a sale by the husband of a plantation, the property of the community, but before payment has been made, the purchaser who has no knowledge of her death, is not guilty of fraud if he compromises with the husband, as vendor, by taking up his notes and giving others in their place for a less amount.

*Ib.*

5. The husband, as one-half owner in his own right of community property which he has sold before the dissolution thereof by the death of his wife, and having the usufruct of the other half of the community, has the right to collect the notes given for the price of the sale.

*Ib.*

6. A judgment debtor who seeks to annul a judgment homologating a final account of the administratrix on the ground of fraud must, in order to maintain his action, show the fraud.

*Carroll v. Wooley*, 495.

**GARNISHMENT.**

1. A rule taken against a garnishee to show cause why an interrogatory shall not be taken for confessed, will be dismissed if the answer of the garnishee to the interrogatory shows that he has answered the questions asked categorically.

*Ullmeyer v. Ehrmann*, 32.

## GARNISHMENT—Continued.

2. A judgment creditor can not maintain a garnishment process, or seize by attachment, the rights and credits of the debtor, until he has obtained judgment on his demand, unless he shows that a fraudulent or simulated transfer has been made by the debtor of his property before the attachment was levied. C. P. 240.

*Lefevre v. Landry*, 82.

3. A garnishment process is a suit, and the garnishee must be brought before the court by citation. A judgment against the wife as garnishee can not, therefore, be rendered unless she has been first authorized by her husband or the judge to appear and defend the suit.

*Delacroix v. Hart*, 141.

4. The seizure of goods or effects in the hands of the garnishee is deemed to be made by the sheriff at the date of the service of the interrogatories upon him. The return by the sheriff of the *feri facias* without returning a copy thereof, before the garnishee has answered the interrogatories, is not therefore an abandonment of the seizure made by the plaintiff in execution. In such a case the garnishee must answer the interrogatories the same as if the writ of *feri facias* or a copy thereof was still in the hands of the sheriff.

*Egana v. Bringer*, 164.

5. The fact that a party cast in a suit has brought an action of nullity of judgment will not interfere with his right of appeal from the same judgment. The appeal will not therefore be dismissed on that ground.

*Cockfield v. Tourres*, 168.

6. A garnishee who is required to answer interrogatories in open court on a day fixed, is entitled to personal notice, which must be given him a reasonable time before the day for answering. A judgment rendered against a garnishee on interrogatories taken *pro confesso* without notice having been given for a reasonable time to the garnishee, will be set aside on appeal, and the cause will be remanded.

*Ib.*

7. A garnishee in attachment proceeding is not entitled to appeal from an interlocutory order of the court directing the sheriff to seize and hold the funds in the hands of the garnishee subject to the decision in the attachment suit, because the garnishee, being a mere stakeholder, has no interest in the disposition to be made of the funds attached.

*Rochereau v. Guidry*, 294.

8. A defendant in an hypothecary action founded upon a judgment rendered in a garnishment process, who files the plea of discussion and deposits the amount required to carry on the discussion, is not precluded thereby from the right of appeal from the final judgment ordering the property seized to be sold.

*Alter v. Pickett*, 513.

9. A judgment rendered by one of the district courts of the parish



**GARNISHMENT—Continued.**

of Orleans against a person domiciliated in the parish of Bossier, under garnishment proceeding had under a judgment rendered by the district court of the parish of Orleans, is absolutely null and void, because the district court of the parish of Orleans is without jurisdiction *ratione personæ*. This nullity is so absolute that any person having any interest therein, or is affected thereby, may at any time urge such nullity before the tribunal where the attempt is made to enforce it. *Ib.*

10. The recording of such a judgment in the parish where the property of the defendant in garnishment is situated confers no mortgage rights in favor of the judgment creditor, and consequently does not lay the foundation for an hypothecary action against the property of the judgment debtor. *Ib.*

**GOVERNOR.**

1. The Governor of the State as chief executive officer, can not be compelled by mandamus to perform acts required by law to be done by him.

*State ex rel. Mississippi Valley Navigation Co. v. Warmoth, 351.*

2. In 22 An. page 1, it was decided that the judiciary was without power to direct the Chief Executive of the State to perform any act coming within the range of his duties as Governor. That decision is reaffirmed by the decision in this case. *Ib.*

**HOMESTEAD.**

1. In this case the property of the debtor had been sold under a judgment, and a twelve months' bond was given for the price, which was less than the amount of the judgment. The widow and heirs of the deceased debtor, left in necessitous circumstances, sought by rule to have the bond or its proceeds applied to the payment of their claim of one thousand dollars under the homestead act. Held—That the property having been sold before the death of the debtor, it no longer formed a part of his succession, nor did the bond which was the price thereof, and the widow and heirs had no claim against the property, nor the proceeds thereof, in payment of their demand. *Murphy & Co. v. Bulh, 74.*

2. The widow of her deceased husband, or her heirs, if left in necessitous circumstances, are entitled to recover one thousand dollars from his succession. In such a case, if it be shown that there are not sufficient funds in the estate, unencumbered by mortgage, to pay it, then the mortgages must contribute the balance.

*Succession of Cerise, 96.*

**HUSBAND AND WIFE.**

1. The wife, whether separated in property from her husband or not, can not bind herself for his debts, nor can she bind herself conjointly with him for debts contracted by him before or during

**HUSBAND AND WIFE—Continued.**

the marriage. 14 An. 700; 21 An. 525. It is incumbent upon a person who has contracted with a married woman, if he wishes to hold her, to see that the proceeds of the obligation she contracts inures to her separate advantage. 1 An. 428; 7 An. 293.

*Carroll v. Manning*, 142.

2. A written agreement between the husband and the wife, who have been divorced at a suit of the wife on the ground of the adultery of the husband, which makes provision for the settlement and partition of the community property, is a law between the parties, and a judgment of the District Court which carries into effect and renders executory the provisions of the written contract will not be disturbed on appeal.

*Mann v. Mann*, 427.

3. The wife who joins her husband in the purchase of a tract of land and takes the title to a portion of the land in her own name, for which a cash payment is made and acknowledged by the vendor, and for the balance notes are given with the vendor's privileges retained, can not be permitted to intervene in a suit by the vendor to enforce the vendor's lien and be relieved from the vendor's lien so far as her portion of the property is affected, unless she shows that the money paid for her portion of the land was her separate paraphernal funds, and under her separate administration at the time.

*Pope v. Foster*, 521.

**IMMOVABLES.**

1. An iron safe which has been incased in a brick wall, with its foundation laid in bricks and mortar or plaster, is an immovable by destination, and can not be recovered by a person claiming it, separate and apart from the buildings and premises in which it is located.

*Folger v. Kenner*, 436.

**INJUNCTION.**

1. The fact that the notary who took an inventory of a succession failed to cite the tutor to the minor heirs, is not a good ground for injunction the sale of the succession property to pay its debts.

*Ducote v. Bordelon*, 145.

2. An injunction will not be dissolved on bond if the injury caused thereby would be irreparable. The injury would be irreparable if the damages resulting from its dissolution could not be passed upon in the final decree in the case, or if its dissolution would work a change in the possession of real estate.

*Boedicker v. East*, 154.

3. In the trial of an injunction suit to avoid the payment of the price of a tract of land, on the ground of a stipulation in the contract that the vendor was to perfect the title before he could enforce payment of the price, parol evidence is inadmissible to show the

**INJUNCTION—Continued.**

true intent of the parties in the clause authorizing the purchaser to withhold payment of the price until the title is perfected.

*Wade v. Percy*, 173.

4. If an injunction has been obtained against the enforcement of a judgment and the evidence given on the trial of a rule to dissolve it shows clearly that the plaintiff had no grounds for injunction, then damages will be given against the plaintiff in injunction, regulated by the amount of the judgment enjoined.

*Stewart v. Robinson*, 182.

5. The wrongful suing out of an injunction to stay the execution of a judgment of the Supreme Court on alleged grounds that have arisen subsequent to the decision will not be regarded as a contempt of the authority of the Supreme Court.

*Villavas v. Walker*, 213.

6. Questions in relation to the validity of judgments rendered against a parish, and appropriations made by the police jury to pay them, with other accounts of the receiving and disbursing officers of the parish, can not be inquired into in an injunction suit taken out by a taxpayer against the tax collector of the parish. Nor can the right to the office of tax collector, or any other officer in the parish, be tested in such a proceeding.

*Lambeth v. De Bellevue*, 394.

7. A judgment creditor who accepts a warrant on the treasury of the city of New Orleans, which, when paid, is to operate an extinguishment of the judgment, must return or offer to return, the warrant before he can proceed further in its execution. If the judgment creditor has failed to return the warrant, but has attempted to collect it, then and in such case an injunction will lawfully issue, restraining the execution of the judgment. *New Orleans v. Smith*, 405.

8. A person holding or claiming a piece of real property under a simulated title can not maintain an injunction against the sale thereof by judgment creditors of his vendors.

*Lewis v. Dinkgrave*, 489.

9. A person who alleges that he has an interest in a judgment that has been enjoined, who was not a party, either directly or indirectly, to the suit in which the injunction was granted, and shows no transfer or subrogation, can not control the execution of such judgment.

*Willis v. Nicholson*, 548.

**INSOLVENCY.**

1. The sale of his property by a debtor in insolvent circumstances, may be annulled on the ground of fraud; and in such a case fraud will be presumed if the vendee had knowledge of the insolvent condition of the vendor at the time of the sale. C. C. 1984.

*Southern Dry Dock Co. v. Bayou Sara Packet Co.*, 217.

### INSOLVENCY—Continued.

2. A mere creditor of an insolvent has no right to claim the possession of property that has been surrendered, nor has he any right to demand or receive the rents of such property. In such a case the possession belongs of right to the syndic and the rents belong to the owner.  
*Dunbar v. Steib*, 268.
3. The appointment of a receiver for a corporation on an *ex parte* application, without even alleging its insolvency, is absolutely null, and carries with it no right to receive the assets or revenues of the company.  
*Turgeon v. Brady*, 318.

### INSURANCE.

1. An insurance company can not be compelled to pay more than one license for permission to carry on their business, although they may have established more than one office or place of business. The license imposed on insurance companies is a tax on the occupation, and not on the business establishment, and must, therefore, be uniform on all such companies.  
*The Merchants' Mutual Insurance Company v. Blandin*, 112.
2. In case of the insurance of a cargo of cotton to be shipped from the port of New Orleans to Havre, France, and the vessel arrives at the port of destination with a loss of only a part of the cargo, less than one-half, the rule is that the insured can not claim an abandonment, nor can a loss of a part of the cargo at the port of destination after a portion of it has been delivered at its destined port, be made a constructive total loss by abandonment, however large that part may be.  
*Merchants' Mutual Insurance Company v. New Orleans Mutual Insurance Company*, 305.
3. A reassurer who has taken a part of the risk from the insurer, may urge all the defenses which the original insurer could urge, when sought to be made liable to the original insurer for losses sustained by the assured; and any of these defenses may be urged by the reassurer, although the assured may have consented to the constructive total loss by abandonment.  
*Id.*
4. A defective citation addressed to a company, or the agents of a company, is cured by the defendants appearing and answering by general denial. An insurer does not lose his right to recover on the policy in case of loss by fire, because he has not paid the premium, if it be shown that it was not the custom of the company to exact prompt payment. 19 An. 214. *La Societe v. Morris & Co.*, 347.
5. It being shown to be a custom to consider all cotton shipped to a merchant as covered by an open policy of insurance, unless the contrary is expressed in the bill of lading. Held—That where no such reservation is expressed in the bill of lading, the insurance company is bound, in case of loss, for all the cotton shipped.  
*Bramstein v. Crescent Mutual Insurance Company*, 589.

## INTEREST.

1. A judgment may be rendered, on motion, at any time after suit is instituted on such items of an account as are admitted to be correct by the defendant, reserving the right of the defendant to contest items not admitted. In such a case, legal interest may be recovered on the items admitted from the date of their admission.

*Conrad v. Burbank*, 17.

2. A particular legatee, as a general rule, can only claim interest on the legacy from the day the demand of delivery was made. R. C. C. 1626. But it, as in this case, the testatrix has fixed a day at which it becomes exigible, and the executrix charged with the execution of the will, which confers the legacy, has ordered its execution and has classed the legacy as a debt against the succession, then and in such case interest is due on the particular legacy from the date at which the testatrix has classed it as a debt.

*Succession of Johnson*, 125.

## INTERVENOR.

1. The act of Congress of March 2, 1867, which authorizes the removal of a cause from a State court to the Circuit Court of the United States under certain circumstances does not change the law regulating the jurisdiction of the Federal Court, as to persons. A removal of a cause to the Circuit Court of the United States can not therefore be allowed if the record fails to show that as to persons, the Federal Court can exercise no jurisdiction.

*Martin v. Coons*, 169.

2. An application for a removal based on the allegations of an intervenor alone, that he is not a resident of the State, is not sufficient to authorize the change, if the record shows that the plaintiffs in the action are residents of the State. Moreover the application will not be granted, if the intervenor merely avers that he is, at the time of filing of his intervention, a resident of another State. It results then that in such a case the intervenor must allege and show affirmatively that he and the plaintiffs were both residents of another State than that of the defendant at the time suit was brought.

*Ib.*

## JUDGMENT.

1. The maxim *de minimus non curat lex* will not be applied to a case where judgment has been given for one year's interest more than is due on the demand, but in such a case the judgment of the court *a qua* will be amended so as to allow interest only from the time it was due.

*Census v. Shackelford*, 39.

2. An action to annul a judgment may be entertained as a general rule, if it be shown that the machinery of the court has been abused. In such a case the court will prefer to excuse an inadvertence rather than to encourage a fraud.

*Noyes v. Loeb*, 48.

## JUDGMENT—Continued.

3. A judgment will be annulled if it be shown that the instrument on which it is based has been paid or satisfied before the institution of suit, and the fact of payment concealed. *Ib.*
4. The law does not authorize judgment to be rendered on a demand that it is not due at the institution of the suit. In case suit be brought on several claims, only one of which is due, judgment will only be given on such claim, reserving to the plaintiff any privileges which he may have acquired by attachment on the property of the debtor on claims not yet due. *Ohristen v. Rhulman*, 50.
5. All judgments for money should be expressed in dollars and cents. A judgment given by the court *a qua*, for a certain amount in francs, is therefore erroneous, and will be amended on appeal so as to express the amount in dollars and cents.  
*Erlanger v. Avegno*, 77.
6. A judgment which is not signed by the judge *a quo* can not be made the basis of a plea of prescription. The rendering of judgment for the amount due and on terms to meet the other installments not yet due, does not merge the unmatured installments in the judgment, and, therefore, such a judgment can not be made the basis of prescription, to commence from its date.  
*Bynum v. Gordon*, 160.
7. A judgment obtained on the allegation that the defendant has permanently left the State is void, if it appear that at the time the attachment was sued out the defendant resided in the State. If the property attached has been alienated before the seizure, and the defendant makes no appearance in the attachment suit, nor has been personally cited, then and in that case the judgment is alike void.  
*Succession of Durand*, 352.
8. A valid judgment obtained by attachment only operates on the property attached, and forms no personal claim against the defendant or his estate, and such a judgment so obtained should not, therefore, be classed on the tableau filed by the executor as a debt against his succession. *Ib.*

## JURISDICTION.

1. If the amount involved does not exceed five hundred dollars, exclusive of interest, the district courts for the State are without jurisdiction. Constitution article 83. A suit for an amount less than five hundred dollars was, therefore, properly dismissed for want of jurisdiction, although the accrued interest when added to the principal exceeded that sum. *Badeaux v. Blake*, 184.

## JUDICIAL SALE.

1. A decree of the probate court ordering the sale of succession property, can not be attacked collaterally by the heirs, in a pro-

## JUDICIAL SALE—Continued.

- ceeding to be recognized as the owner of the property which has been sold under it, on the ground that the order of sale was irregular and null. *Peyroux v. Peyroux*, 175.
2. In a succession sale of property for the purpose of effecting a partition among the heirs, the appointment of a special tutor to each is unnecessary. *Ib.*
  3. The appointment of another person than the one first designated to make the sale of succession property for the purposes of partition does not render the order of sale or the sale a nullity. *Ib.*
  4. The purchaser of property at probate sale has nothing to do with the character of the judgment directing the sale of the property; whether such a decree be a judgment of partition is immaterial to the purchaser. *Ib.*
  5. An action to annul a judicial sale of real property, on the ground of irregularities in the proceedings, can not be maintained against the purchaser, unless the parties claiming its nullity have paid or offered to reimburse the purchaser, the amounts of the mortgages resting on the property which he has paid since the purchase. In such a case it is held—that a tender of the amounts thus paid by the purchaser is an essential prerequisite to the prosecution of a suit to annul. *Barelli v. Gauche*, 324.
  - 6 A purchaser of real estate at judicial sale must comply with the terms of his bid by paying the price before he can demand a title from the sheriff translatif of the property. If he fails to pay the price the property does not pass to him, and he can not maintain an injunction to stay its sale, when made by a creditor, on the ground that he is the owner. *Losee v. Sauton*, 370.
  7. A purchaser of mortgaged property at judicial sale is bound to retain in his hands the proportion of the price coming to a concurrent mortgage note, not embraced in the judgment under which the sale is made, and to deliver such proportion to the holder of such note. As to the purchaser no reinscription of the mortgage is necessary, because he has by the purchase assumed the debt to the extent of the proportion of the purchase money, which he must retain. The plea of peremption will not, therefore, avail him in a suit by the holder of the note to compel him to pay, because, having assumed the debt, reinscription of the mortgage is unnecessary. *Johnson v. Duncan*, 381.
  8. The parish court is without jurisdiction to entertain an action to enforce a mortgage claim against a succession where the amount involved is above five hundred dollars. *Truxillo v. Truxillo*, 453.
  9. Real estate belonging to a succession can not be sold under judicial process without dividing it into lots varying from ten to fifty acres. Constitution, art. 132; R. Statutes of 1870, sec. 2452. *Ib.*

## JUDICIAL SALE—Continued.

10. The sale by authority of the probate court of real estate extinguishes the mortgages upon it prior to the sale, and transfers them to the proceeds, and a purchaser has the legal right to restrain by injunction the further pursuit of the lands by the mortgage creditors. A sale of this kind can only be attacked by direct action.  
*Wooley v. Russ*, 482.
11. An agreement made and reduced to writing between the administrators of an estate and third parties relative to the sale of a plantation under administration by them which fixes a price per acre, and binds the administrators to make a good title before the money is paid is not, in itself, a fraudulent nor an illegal act which will vitiate the sale when regularly made in pursuance of the forms of law in the sale of succession property.  
*Heirs of Brown v. Jacobs*, 526.
12. If the terms of the sale of succession property were partly for cash and partly on credit, the fact that the purchaser chooses to pay the entire price in cash is not an evidence of fraud on the part of the purchaser, especially if the notes which were to be given for the credit portion only drew interest after a specified time from their execution.  
*Ib.*
13. Forced heirs have only a residuary interest in the succession of their ancestors, and they can not therefore maintain an action to annul a judicial sale, which has been regularly made, of their ancestors' property to pay the debts of the succession.  
*Ib.*
14. A judicial sale of real estate belonging to a succession which has been made for the purpose of paying the debts of the estate before the adoption of the Constitution of 1868 is not void or voidable, because the price received was in Confederate treasury notes. Article 149 of this Constitution has no application to contracts which had been executed before its adoption. In such a case the courts will leave the parties where their conduct has placed them.  
*Ib.*
15. The third section of the act of 1869 which authorizes the sale of property seized under execution to be sold without appraisement when it appears that, in the event any party refuses to qualify as appraiser under the provisions of this act, then the property shall be sold without any appraisement whatever, is constitutional. There is no lesion in judicial sales.  
*Weber v. Gorsuch*, 615.
16. A second mortgage creditor who seeks to annul a judicial sale made at the suit of first mortgage creditors, on the allegation of collusion between the judgment debtor, the sheriff and the purchaser, can not be permitted to prove that the debtor was at the time deficient in mental capacity, and was therefore incapable of making a contract.  
*Ib.*



## JURIES AND JURORS.

1. In a civil case in which the parties are entitled to a jury, if the jury has not been drawn in accordance with law, the verdict will be set aside on appeal, and the cause will be remanded to be tried *de novo*. *Compton v. Legras*, 259.

## JURISDICTION AND TRANSFER OF CAUSE.

1. The act of Congress, approved March 2, 1867, which authorizes the transfer of causes, under certain circumstances, from the State courts to the federal courts, can only be invoked by the plaintiff or defendant in the cause. It can not be invoked by an intervenor who voluntarily makes himself a party to the suit. Nor will the transfer be allowed if it be made for the first time by the plaintiff or defendant in the appellate court of the State. Such applications to transfer causes from one jurisdiction to another, should be made before the cause was tried in the court of the first instance.

*Williams, wife of Von Phul, v. Succession of Williams*, 55.

## LAWS.

1. The law which creates the office of parish attorney and authorizes the police juries to fix the salary and emoluments thereof, does not prohibit the police juries from making a contract for increased or extra compensation in particular cases. A contract with the parish attorney for extra compensation is therefore valid and binding upon the parish. *Bills v. Parish of Iberville*, 146.
2. The act of the Territory of Orleans of 1806, creating the office of crier to the courts and fixing the fees thereof, was repealed by the act of 1855, regulating costs and fees generally. An action can not therefore now be maintained to recover fees allowed a crier of a court under the act of 1806, because the act allowing such fees has been repealed. *Hart v. New Orleans*, 290.
3. The act creating the parish of Red River and attaching it to the Eleventh Judicial District became a law subsequent to the act creating the Eighteenth Judicial District, which prospectively included the parish of Red River in that district. Held—That the subsequent act creating the parish of Red River and attaching it to the Eleventh Judicial District showed that the legislative intention was changed, and that the parish of Red River having been first prospectively attached to the Eighteenth Judicial District was afterwards attached to the Eleventh. *Bryan v. Gillespie*, 470.
4. The act of the General Assembly creating the new parish of Red River and attaching it to another judicial district repealed the former act which rendered its territory subject to the jurisdiction of the Eighteenth Judicial District, and judgments rendered by the judge of this judicial district, after the passage of this act, are void for want of jurisdiction over the parish. *Cushing v. Robinson*, 495.

**LEASE.**

1. In 1868 the city of New Orleans leased the Dryades Market to defendant for one year. In 1869, before the year had expired, the city annulled the contract and took possession of the market. Afterward the city brought suit on the notes given by the lessee for the market for one year. Held—That the city having annulled the contract before the expiration of the term of the lease, and having again taken possession of the market, she could not recover on the notes given by the lessee.

*City of New Orleans v. Moscal*, 102.

2. The lessor has a right of pledge on the movables on the plantation leased to secure the payment of the rent, which it is not necessary to have recorded in order to give it a preference over the privilege allowed by law to the purchaser of supplies.

*Burnett v. Olencay*, 143.

3. A stipulation in a contract of lease to collect wharfage for a given period of time, which reserves the right to the city to have it annulled if the other contracting party fails to comply with his obligations, is a law between the parties, and the failure to comply with his obligations, on the part of the other contracting party, gives the city the right to have the contract annulled by judicial proceedings.

*City of New Orleans v. Rigney*, 285.

4. In an action against a surety on a lease, the burden falls on the defendant who specially pleads his discharge from liability by the action of the plaintiff, of establishing his special defense by a preponderance of proof.

*Bayley v. Jeneven*, 288.

5. In this case the evidence shows that plaintiff had several conversations with defendants, or some of them, in reference to the leasing of certain houses and tenements for a store on Canal street; that the parties intended to perfect their agreement about the lease by reducing it to writing. It was never reduced to writing, and the plaintiff now seeks to enforce it as a verbal lease.

Held—That it being shown that it was the obvious intention of the parties to reduce the terms of the lease to writing before it was considered as complete, that the defendants, as lessees, could not be held on the plaintiff's showing a verbal lease merely.

*Wolf v. Mitchell*, 433.

6. A lessor who has consented to a sub-lease by the lessee can not afterward hold the sub-tenant liable as a third person, and claim a lien and privilege on his property found on the premises to secure the rent due or to become due by the lessee.

*Freeland v. Hyllested*, 450.

7. A person owning a house in the city of New Orleans situated within the limits of the district where the keeping of houses of prostitution are allowed by the city, may lease his house for that

**LEASE—Continued.**

purpose and recover the rent from the lessee. In such a case the lessee can not be permitted to plead the immorality of her own calling as a shield against the payment of the rent of the property which she has used. The decision in the case of *Kathman v. Walters*, 22 An., page 54, is overruled by this decision.

*Lyman v. Townsend*, 625.

**LEVEES.**

1. The acts of the General Assembly of 1867 and 1868 providing for the construction and the maintaining of the levees on the Mississippi river in the State of Louisiana superseded the former laws imposing upon the riparian proprietors the burden of constructing such levees at their own cost, and the parishes were thereafter without the right or authority by ordinance of the police jury or otherwise, to bind the lands of any front proprietor for the construction of any levee on the bank of the river.

*Surgi v. Matthews*, 613.

**MALICIOUS PROSECUTION.**

1. A person who causes the arrest and imprisonment of another, without showing probable cause for his conduct, is liable in damages, and the acquittal of the person arrested after a trial or an examination, is presumptive evidence of want of probable cause for the arrest.

*Letzler v. Huntington*, 330.

**MANDAMUS.**

1. The writ of mandamus can not be invoked by a creditor of the State to compel the State Treasurer to make a certain distribution of funds, not yet in his hands, as they may be received by him.  
*State ex rel. Hillman v. Dubuclet, Treasurer*, 16.
2. An order of court directing the Treasurer to register and pay warrants drawn on the State treasury in the order of registration, with funds thereafter received, is an abuse of the judicial power, and null and void.  
*Ib.*
3. A mandamus will only lie in such a case to compel the Treasurer to pay demands on the treasury when the funds are in his hands.  
*Ib.*
4. A judgment of a court making a writ of mandamus peremptory is a final judgment which can not be vacated or set aside by the judge *a quo* on a rule taken by the defendant in mandamus. Such judgment can only be annulled on appeal or by direct action of nullity.

*State ex rel. The Board of School Directors v. Conway*, 132.

5. A judge who has dismissed an appeal on the ground that the surety is not good, can not be compelled by mandamus to send up the record. The proper remedy to prevent the judge from executing the judgment is by prohibition. 21 An. 113.

*State ex rel. Dezutter v. Judge of the Fifth District Court*, 316.

**MANDAMUS—Continued.**

6. In a case where the Legislature has by law authorized the making of a contract to improve and clean out a navigable stream, and has made an appropriation therefor, the Auditor of Public Accounts is not authorized to issue certificates of indebtedness for such work or parts thereof, as may appear to have been done in conformity with the requirements of the act authorizing it. Section 187 of the Revised Statutes of 1870, which authorizes the Auditor to issue his certificates for all just indebtedness against the State, which is not provided for by law, does not apply to such a case, because its payment is provided for by appropriation of bonds of the State. A mandamus will not therefore lie against the Auditor to compel him to give certificates of indebtedness in such a case.

*State ex rel. Alban v. Graham, 429.*

7. A mandamus will be granted from the Supreme Court directing the judge of the district court to grant an appeal from a judgment on a rule authorizing an execution to issue against executors for a certain amount, if it be shown that the rule was made absolute, and an execution issued thereon for a larger amount than the judgment creditor was authorized to demand of them.

*State ex rel. de Feriet v. Judge of the Second District Court, 596.*

**METROPOLITAN POLICE.**

1. Certificates of indebtedness or police warrants issued by the Board of Metropolitan Police are not bills of credit within the meaning of section ten of article one of the Constitution of the United States. The statute of twenty-seventh of February, 1869, making such warrants receivable for taxes due the city does not violate this provision of the Constitution, and is not, therefore, void on that account.

*City of New Orleans v. Mount, 37.*

**MARRIED WOMEN.**

1. A married woman may, with the consent of her husband, be appointed dative testamentary executrix.

*Succession of Corderiolle, 47.*

2. Article 1664 of the Civil Code, which allows a married women to accept the testamentary executorship, with the consent of her husband, confers the same power on the judge to appoint a married woman dative testamentary executrix, on her receiving the consent of her husband.

*Ib.*

3. The authorization by the judge of a married woman to borrow money and mortgage her separate property therefor, under the provisions of the act of fifteenth of March, 1855, must be given before the debt is contracted or the mortgage is given.

*Falconer, v. Stapleton, 89.*

4. In a suit against a married woman, the plaintiff must show affirmatively, before he can recover, that the debt incurred to the separate

## MARRIED WOMEN—Continued.

advantage of the wife. This must be shown whether the wife be separate in property from her husband or not.

*Urquhart v. Thomas*, 95.

5. If it be shown that a running account exists between the drawer of a draft and her commission merchant, then and in such case the drawer is entitled to notice of the dishonor and non-payment by the drawee, and if such notice be not given, then the drawer is not bound to the payee or holder of the bill, although it should be shown that the drawer had no funds in the hands of the drawee at the time it was drawn. *Ib.*

6. Where a married woman appears in court as plaintiff without the authorization of her husband, the presumption is that the husband has refused, and the judge may authorize her without it being shown that the husband was absent or refused.

*Jemison v. Barrow*, 171.

7. A third person who discloses no interest in a suit to annul a sale, on the ground that the vendor has not complied with its terms and conditions, can not be permitted to intervene in the suit.

*Ib.*

8. By the provision of the charter of the Citizens' Bank of Louisiana a married woman may become a subscriber to the capital stock of the bank, and bind herself or her property conjointly with her husband, or *in solido*, cede, mortgage and hypothecate her property to the bank, the same as if she were a *femme sole*.

*Wells v. The Citizens' Bank*, 273.

9. A suit is instituted by the wife to annul a sale of her property mortgaged to the bank under this charter, on the allegation that the loan from the bank inured to the benefit of the husband. Held—That under the provisions of the charter the wife as a subscriber to the capital stock of the bank was authorized to mortgage and hypothecate her separate property to the bank, and that a sale regularly made to enforce the mortgage rights upon her property thus mortgaged was not null because the bank had not shown that the loan inured to her separate benefit. *Ib.*
10. A married woman is not bound either jointly or *in solido* with her husband for medical services rendered during her illness.

*Choppin v. Harmon*, 327.

11. Rent due for the use of a plantation can not be recovered from a married woman, unless it be shown that she rented the place, or authorized some one else to rent it for her; nor will an attachment lie against her property to compel the payment of the rent.

*Generes v. Fluker*, 329.

12. A married woman whose husband is still living is prohibited from contracting a second marriage with another man, and if the man

**MARRIED WOMEN—Continued.**

who contracts the second marriage with her has knowledge of the first marriage and that the first husband is still alive, then the second marriage is a nullity, and the children born of such marriage are illegitimate and can not inherit from either party.

*Succession of Virgin*, 485.

13. A married woman who resides in Texas may prosecute an appeal from a judgment rendered against her in the courts of Louisiana, and the prosecution of the appeal includes the right on her part to give an appeal bond.

*Succession of Bailey*, 486.

**MORTGAGES.**

1. Legal or tacit mortgages allowed by law are inoperative against third persons unless they have been recorded in the manner provided by law. Constitution, article 123, act No. 95 of 1869; 22 An. 278. Article 123 of the Constitution, and the act No. 95 of 1869 to enforce it, do not impair the obligations of contracts. These provisions of the Constitution and the laws of the State on the subject are not therefore in conflict with section ten of article one of the Constitution of the United States.

*Succession of Nelson*, 25.

2. The statement in an act of sale of real estate that a certain judicial mortgage "still stands against the property," does not create a personal obligation on the purchaser to pay it. In such a case the judicial mortgage creditor must resort to the hypothecary action to enforce payment.

*Massey v. Finch*, 28.

3. A mortgage retained in favor of the vendor in an act of sale of real estate must be recorded in the book of conventional mortgages to have effect against third persons. If it be only recorded in the book of conveyances, then subsequent mortgages, which have been regularly recorded in the proper book, will take rank over it in the distribution of the proceeds of the sale of the property mortgaged.

*Verges v. Projean*, 78.

4. In this case the judgment creditors of the wife sought to enforce payment by a seizure and sale of her property. The husband brought suit by intervention, and alleged that the property under seizure was encumbered by a tacit mortgage in favor of his former wife and her heirs, to whom he was tutor; that during the former marriage he was the owner of the property seized; that he had received forty thousand dollars from his former wife of her individual funds, and had applied them to his own use for which he had never accounted, and the tacit mortgage attached to his property now under seizure. He further alleged his utter insolvency and asked that the proceeds of the sale of the property be paid to him as the tutor of his minor children by a former marriage, as their tacit mortgage on the property seized was superior to that of

## MORTGAGES—Continued.

the suing creditors. Held—That the tutor in order to pay a debt due by himself to his minor children (he being insolvent) could not be allowed to receive the proceeds of the sale of property subject to a tacit mortgage, to secure said debt.

*Richardson v. Barrow*, 133.

5. A mortgage given by an heir on his interest in his mother's estate to secure a debt of his father's to a third person (unless it is so expressed), is not a relinquishment of his legal mortgage on the property of his father, for debts due him by his father as tutor. And in case the father's property is sold by his creditor, the heir's preference to the proceeds of the sale, as a prior and preferred mortgage creditor, can not be defeated on the ground of relinquishment of his mortgage rights by going security for his father.

*Newell v. Buckner*, 185.

5. The recording of an abstract of an inventory of a deceased wife of a man named, fixes the presumption of the existence of minors whose rights are preserved by the recording of the abstract, and the recording of such an abstract is sufficient notice to third persons of the existence of a tacit mortgage, resting upon the property of survivor in favor of the minors. *Donnell v. Gant*, 189.
7. In a contest between mortgage creditors over the proceeds realized from the sale of mortgaged property, the mortgage creditor holding the superior mortgage is entitled to be first paid, whether the obligation for which his mortgage was given matured or not.

*Ledoux v. Morgan*, 249.

8. The assumption of a mortgage by a purchaser of the property and the payment of the interest as it becomes due interrupts prescription as to the mortgage creditor, and the rank and vitality of the mortgage is preserved. The execution of a second mortgage on a different piece of property to secure a debt already secured by a mortgage on other property does not *ipso facto* novate the first mortgage.

*Lery v. Police Jury of Pointe Coupee*, 292.

8. A judicial mortgage creditor of inferior rank to that of a conventional mortgage creditor may proceed by rule against the latter to show cause why his conventional mortgage should not be erased, without proceeding by direct action to set aside the conventional mortgage, and the conventional mortgage creditor must plead to the rule, and not except to the judicial mortgage creditor proceeding in that form to get rid of the mortgage.

*Merrick v. McCausland*, 256.

9. The act of 1870, which makes the respective parishes defray the expenses of recording the abstracts of minor's mortgages, does not impair the obligations of a contract, and is not therefore void on that account.

*Southworth v. New Orleans*, 312.

## MORTGAGES—Continued.

10. The expenses of making and registering these abstracts are not debts of individuals, but they are charges imposed by law without the consent of the parties, and the General Assembly is competent to declare that such expenses shall be defrayed by the parishes.  
*Ib.*
11. The city of New Orleans being the parish of Orleans, comes technically under the act of 1870, which imposes these burdens on the respective parishes. The recorder is only entitled to charge for one registry of each abstract, although it may contain several mortgages, and not being required by law to give a certificate, he can not charge for it.  
*Ib.*
12. The acts of the General Assembly of Louisiana providing for the liquidation and settlement of the Consolidated Association of the Planters of Louisiana, under the management of the board of directors, who are authorized to do every thing necessary to effect the liquidation, must be held as authorizing them to stand in judgment.  
*Consolidated Association of the Planters of Louisiana v. Mason*, 518.
13. A mortgage given on a tract or body of land is sufficiently descriptive if it is reasonably accurate and full in itself so as to inform the public what property is covered by it without stating the township, range and section in which it lies.  
*Ib.*
14. A third person who has purchased property which is incumbered by a mortgage which does not contain the pact *de non alienando* while proceedings are pending by the mortgagee to enforce it, and is in possession under a title translatif of property, can only be evicted by the mortgage creditor by an hypothecary action. C. P. art. 69.  
*Taylor v. Pipes*, 551.
15. Property thus situated can not be seized under proceedings to enforce the mortgage until it has been declared subject to the mortgage by an hypothecary action; and if it has been seized, an injunction will legally issue to protect the third possessor in the enjoyment of his property.  
*Ib.*
16. Mortgage creditors who appear as third opponents to claim the proceeds of the sale of the property under another mortgage can not be allowed to question the authority of the agent who gave the mortgage under which it was sold, for the reason that a party can not attack the validity of a sale and at the same time claim to be paid out of the proceeds.  
*Theurer v. Knorr*, 597.

## NEW ORLEANS.

1. The municipal government set up by the military authority of the United States for the city of New Orleans, which continued from 1862 to 1866, and administered the affairs of the city by officers appointed by the military authority, was not the government of a



NEW ORLEANS—Continued.

conqueror. The doctrine in relation to contracts made by an occupying conqueror in reference to property of the conquered, from which he is afterward expelled, or which he is required by treaty to give up, has no application to contracts made by such municipal officers.

*Prather v. City of New Orleans*, 41.

2. A contract made by the city, under the authority of an ordinance of the Common Council, whereby the steam ferry privileges were sold to a third person for a given period of time, was therefore binding and obligatory upon the city, even though the officers in possession of the city government at the time the contract was made, were superseded by officers appointed or elected by the city herself before the term of the contract had expired. *Ib.*

3. In this case it was held, that inasmuch as the city government that succeeded the one by which the steam ferry privileges had been given, had repealed the ordinances of the former council which authorized the contract, and had taken the contracts for the steam ferry privileges away from the contractor and given them to another person, the first contractor was entitled to recover from the city the damages which the violation of his contract had caused him. *Ib.*

4. The city of New Orleans having acquired the Waterworks by purchase from the Merchants' Bank, under a provision of the charter of the bank, has now full control of the hydrants in the streets; and as she has full control of the streets as public highways, she may manage the distribution and disposition of the water that flows through the hydrants and thoroughfares in such a way as to be of the greatest advantage to the inhabitants of the city.

*McKnight v. City of New Orleans*, 412.

5. A person who has heretofore had the exclusive privilege from the city of using water from the hydrants for the purpose of sprinkling the streets, can not complain if this privilege has been (in a regular way) taken from him and given to another who paid more for the water than he had paid, because it is within the power of the city, through her administrators, to withhold altogether, and from all persons, the use of water from the hydrants for the purposes of street sprinkling. An action in damages will not, therefore, lie in favor of such person who has lost the occupation of street sprinkling by the city conferring it upon another. *Ib.*

SEE CORPORATIONS.

NOTARY PUBLIC.

1. The fact that a person is a notary public does not of itself entitle him to the custody or control of the records of a deceased notary. Such person is not, therefore, entitled to an appeal from an order of the judge *a quo*, directing him to deliver the records of the de-

## NOTARY PUBLIC—Continued.

ceased notary to the proper officer designated by law to receive them. An oath of such notary that he has an interest in retaining possession of the records of the deceased notary above five hundred dollars is not sufficient of itself to vest the appellate court with jurisdiction of the appeal.

*State ex rel. Hero v. Laresche*, 148.

## OBLIGATIONS.

1. An obligation given by a commercial firm to a third party, acknowledging an indebtedness, on account of land speculations between the parties, conditioned that it is to be paid out of the proceeds of the lands when sold, is suspensive in its character, and can not be enforced until the lands have been sold.

*Breaux v. Lauve*, 179.

2. A suit for partition may, however, be entertained to divide the lands in kind, among the different claimants, and if a judicial sale is necessary to effect a partition, then, and in that case, the suspensive obligation may be enforced against the proceeds of the sale.

*Ib.*

## OFFICE AND OFFICERS.

1. A commission issued by the Governor appointing a person to an office not vacant, is an absolute nullity and confers no title whatever in the appointee to the office.

*State ex rel. Robinson, District Attorney, and Edmondson v. McNeely*, 19.

2. The Governor has no power under the Constitution to destitute a constitutional officer of his office. Such offices can only be vacated in the manner pointed out by the Constitution and the laws. *Ib.*
3. The commission of a tax collector who has not been confirmed by the Senate within the time prescribed, expires on the third Monday after the meeting of the next General Assembly, and the office becomes vacant, and such person so appointed, but who has not been confirmed, can not thereafter maintain a suit under the Intrusion act against another person who has been appointed by the Governor to fill the vacancy. Nor can such person whose office has become vacant by the non-action of the Senate maintain a mandamus against the Auditor of Public Accounts to compel him to warrant in favor of such defunct officer for an advance allowed by law to the Assessor, because the office which he holds is vacant as to him, and he has no right to the advance allowed the lawful officer.

*State ex rel. George v. Board of Assessors*, 410.

4. The suspension by the Governor of the Secretary of State from office did not create a vacancy in the office of Secretary of State, and the Governor is without the power to appoint a Secretary of State unless a vacancy has occurred in the office, and then only *ad*

OFFICE AND OFFICERS—Continued.

*interim*, as provided by the constitution. In case the Governor has appointed a person to take charge of the office during the suspension of the Secretary of State, such person so appointed is only clothed with ministerial duties, and the appointment of an Assistant Secretary of State by such person is absolutely void, because the power of appointing an Assistant Secretary of State is conferred upon the Secretary of State alone, and is not a ministerial act.  
*State ex rel. Wittgenstein v. Herron*, 432.

5. To maintain the plea of *res judicata* the cause of action must be the same. In this case the relator brought suit for the office of Secretary of State, on the alleged ground that the act of suspension by the Governor was unconstitutional and void. Judgment was rendered in favor of the defendant on that plea. Relator afterward brought this suit for the same office, on the allegation that the non-action of the Legislature on the suspension restored him to the office. To this suit defendant urged that the first judgment was *res judicata*. Held—That the cause of action not being the same in the two suits the plea of *res judicata* could not be sustained.  
*State ex rel. Bovee v. Herron*, 594.

6. A public officer, such as the Secretary of State, who has been suspended from his functions by the Governor is entitled to resume his office immediately after the adjournment of the next General Assembly, provided no action has been taken on the suspension during the session, and his exclusion thereafter is an active, arbitrary violation of his legal and constitutional rights as such. *Ib.*

OVERSEER.

1. An overseer of a sugar plantation who has contracted with the planter to oversee the place for so much on each hogshead of sugar made on the place during the year as his wages or salary, and who has been turned off before his term of service expired, must wait until the year is out, or until it can be ascertained with legal certainty the number of hogsheads of sugar that was made during the year. In case judgment has been given before the year is out for the portion of the time which the overseer served, on a calculation made as to the quantity of hogsheads assumed to be made in the year, and an appeal is taken therefrom, then and in such case the cause will be remanded to the court *a qua*, with instructions to ascertain the number of hogsheads made, and give judgment for so much per hogshead on the quantity actually made.

*Woodward v. Gross*, 109.

2. A claim for overseer's wages is prescribed by three years. A contract by which one person assumes to act as mandatory for another is from its nature gratuitous, and if the contract stipulates no compensation then the mandatory can not recover. *R. C. C.* 2991.

*Wells v. Hawley*, 270.

## OVERSEER—Continued.

3. An overseer who has contracted with a planter by the year and has been discharged by the purchaser of the plantation, under a mortgage, before the year is out, can not hold such purchaser liable for the wages due him after the date of the sale. In such a case the mortgage is superior to the overseer's privilege which has been acquired after the mortgage was given.

*Daspit v. Verret*, 281.

## PARISH COURT.

1. The parish court has no jurisdiction in a contest between two successions, where one claims an amount of money from the other above five hundred dollars. *Bynum v. Bynum*, 127.
2. The parish court is without jurisdiction *ratione materie* to grant an injunction to stay the sale of property where a succession is defendant in the suit, and the amount involved is above five hundred dollars. *Mayer v. Dayries*, 206.
3. The parish court is without jurisdiction *ratione materie* to entertain an injunction suit to annul a judgment of another court. It is also without jurisdiction to entertain such injunction suit where the amount involved is above five hundred dollars. *Woolfolk v. Woolfolk*, 283.
4. The principal object of this action being to annul the plaintiff's own title to a plantation, the value of which exceeded the sum of five hundred dollars. Held—That the parish court was without jurisdiction *ratione materie*, to entertain the suit. *Fellers v. Brown*, 300.
5. The written authorization of the husband to his wife to prosecute the suit is in time, if it is filed before the trial of the exception, that she is not authorized. The settlement of a tutor's account is purely a probate matter, and the parish court has jurisdiction of all such cases without reference to the amount involved. *Salvant v. Salvant*, 316.
6. The parish court is without jurisdiction, *ratione materie*, to pass upon a claim against an estate for supplies furnished, where the amount claimed is above five hundred dollars.

*Succession of Bernard*, 402.

## PARTNESHIP.

1. A commercial partnership, although dissolved, still exists for the purposes of liquidation, and the partitioning of the gains, and the partners may be sued before the court of its domicile for such purposes, and they may be brought before the court by attachment if they be non residents. *Lobloll v. Bushnell*, 295.
2. A suit for the settlement of a partnership which has been dissolved can not be maintained by one of the partners if the other partner shows that a settlement of the partnership has been made.

*Wells v. Erstein*, 317.

## PARTNERSHIP—Continued.

3. A promise to pay the debt of another must be in writing. Two partners engaged in the planting business, are both bound to the merchant who furnishes them with supplies to make the crop for one half their cost.  
*Hill v. Ober, Atwater & Co., 325.*
4. One partner of a commercial firm can not maintain an action against another partner for a specific sum of money alleged to be due on account of partnership transactions. The remedy in such a case is to sue for a liquidation of the partnership. 13 An. 576 ; 21 An. 532 ; 22 An. 429.  
*Stanton v. Buckner, 391.*

## PARTITION.

1. Under the act of 1869, minor's property held in common may be sold for the purpose of effecting a partition at private sale, if any of the heirs having an interest desire it to be made in that form, by complying with the formalities prescribed by the statute in such case. Article 341 and 1336 of the Revised Civil Code which provide that the sale of minor's property must be made at public auction, is not in conflict with nor irreconcilable with the act of 1869 on the same subject, and those articles of the Code do not, therefore, repeal by implication the act of 1869.  
*Durand v. Dubuclet, 155.*
2. A private sale of minor's property made in pursuance of the forms and requirements of the act of 1869 is, therefore, valid and binding upon the minor.  
*Id.*
3. A final judgment of the parish court decreeing a partition and ordering the heirs to be put in possession of the estate, can not be treated as an absolute nullity, nor can it be attacked collaterally.  
*Fowler v. Succession of Gordon, 270.*
4. Where the executor has filed his final account and has been discharged, and the heirs have been put in possession, the creditors of the estate are entitled to recover from each heir his virile share of the debt of his ancestor, and each one of the heirs may be made parties to such a suit.  
*Id.*
5. In this case the tutor caused a partition to be made among the heirs under an order of court, and took the receipt of the agent of the deceased for the minor's interest in a commercial partnership as a final settlement thereof. A succeeding tutor to the minor brought suit for a settlement of the partnership, alleging that the settlement with the tutrix was only provisional. There was no judgment homologating the first partition with the tutrix. Held—That the plea of *res judicata* was not good, as there was no judgment homologating the partition, and that the plaintiff therefore had the right to show that the settlement was not complete, or that it was erroneous.  
*Russ v. Woodham, 487.*

## PAYMENT.

1. Payments which have been made on a debt, which at the time of payment are imputed by both parties to the interest due, can not afterward be recovered back nor imputed to the capital on the ground that the interest due was usurious.

*Johnson v. Phillips*, 156.

2. Prescription may be pleaded at any stage of the proceedings, even on the appeal, but it must be pleaded expressly and specially before final judgment. *Ib.*

3. In this case plaintiff took defendants' note in settlement of a debt, and with the knowledge of defendants placed it in the hands of a third party, to whom payment was afterward made. Plaintiff now seeks to enforce payment against the maker on the ground that the third holder was not authorized to receive payment. Held—That the loss must fall upon the plaintiff, because it was through his fault that the defendants were enabled to make the payment to the third party.

*Baker v. Kinsworthy*, 464.

## PETITORY AND POSSESSORY ACTION.

1. In a possessory action to recover possession of real estate, the plaintiff must show that he was in the peaceable possession of the property at the time the suit was brought, and that he has been disturbed in his possession by the illegal acts of the defendant.

*Deuchatell v. Robinson*, 176.

2. Where the heirs of a deceased person seek by petitory action to recover real estate from the owners who have acquired title thereto at a judicial sale to enforce the payment of taxes due by said property, the burden falls upon the heirs of showing that the proceedings to enforce the payment of the taxes assessed on the lands were irregular and illegal. If in such an action the record discloses that the requirements of the law have been complied with in making the sale, then, and in such case the title will be declared good and valid, and the petitory action by the heirs will be dismissed.

*Clay v. O'Brien*, 232.

3. In seizing real estate under execution, the sheriff must take actual corporeal possession of the property seized, otherwise a petitory action to recover the same, can not be maintained by the purchaser at sheriff's sale. 22 An. 207; 23 An. 512.

*Corse v. Stafford*, 262.

## PLEADINGS.

1. The exception that the petition discloses no cause of action, admits for the purposes of its trial, that the allegations in the petition are true, and if the allegations disclose a cause of action the exception will be overruled. *Cavalier v. Police Jury*, 272.

SEE PRACTICE.

**POLICE JURY.**

1. As a general rule a parish can not, through its police jury or otherwise, contract a debt or incur an obligation binding upon it without at the same time providing the means of paying such debt; but if the parish is involved in heavy litigations, the police jury have the right to contract with experienced attorneys, in addition to their regularly paid attorney, to aid in the defense of such suits, and the parish is legally bound for the payment of their fees. *Talbott v. Parish of Iberville*, 135.
2. Parish warrants which have been issued by the police jury without the authority of law impose no legal obligation or debt upon the parish. *Edwards v. Parish of Bossier*, 457.

**PRACTICE.**

1. A plaintiff who brings suit in his own name as agent is bound to disclose the name and residence of his principal. The fact that a defendant has signed a release bond as security in an attachment suit wherein the plaintiff appeared as agent without disclosing the name of his principal, does not estop him from excepting to the action, on the ground that the plaintiff, as agent, failed to disclose the name of his principal. *Willard v. Eugenbuhl and Ecrot*, 18.
2. The defense to an action brought in the courts of this State, to enforce a judgment rendered in the State of New York, that the New York judgment was absolutely void for want of citation, must be pleaded specially so as to put the plaintiff upon his guard. If in such a suit a form of citation is shown in the record of the judgment in New York, then the presumption will be, under the provisions of section 1 of article 4 of the Constitution of the United States, "giving full faith and credit in each State, to the judicial proceedings of every other State," that such citation was made in conformity with the laws of New York, and is not therefore void for want of citation. *Graydon v. Justus*, 222.
3. The affidavit of a defendant that he is sick and unable to attend court as a witness on the day of trial, is not good cause for a continuance of the case, if it be admitted by the opposite party that he would, as a witness, if present, swear to what he had set forth in the affidavit. *C. P. 466. Pruyn v. Gibbens*, 231.
4. A motion to set default aside on the ground that the wife was not legally authorized to sue will not be maintained, if it appears from the record that the husband joined his wife as co-plaintiff; nor is a peremptory exception that the notes sued upon belonged to the community, a good defense to the action brought by the wife to recover thereon, if in this action the husband has joined the wife in the suit as co-plaintiff. *Evans v. De L'Isle*, 248.
5. A dismissal, on motion of the defendant, of the main action necessarily carries with it the dismissal of the intervention filed in the case. *Walmsley v. Whitfield*, 258.

## PRACTICE—Continued.

6. The decision of the judge *a quo* on a motion to set aside an appeal on the ground that the surety on the bond is not good, will be reviewed on the application to the Supreme Court for a writ of prohibition, and if the surety is found to be good, the order of the judge *a quo* dismissing the appeal will be set aside, and the writ of prohibition will issue.  
*State ex rel. Lynne v. Judge of the Seventh District Court*, 328.
7. When mortgaged property has been sold under judicial proceedings for the benefit of the senior mortgage creditor, the purchaser may proceed by rule to have the posterior and junior mortgages canceled.  
*McNeil v. Hawck*, 328.
8. The Supreme Court will not revise a judgment of the lower court rendered on a rule to dismiss an appeal on the ground that the sureties are not good, if the evidence taken on the trial of the rule in the lower court is not legally before the appellate court.  
*Genoves v. Fluker*, 329.
9. The general denial admits the capacity of the plaintiff. A stockholder in an insurance company can not be heard to urge as a defense to a suit brought against him on his stock note, by the creditors through their representative that the charter has been illegally changed, because no act on the part of the stockholders can defeat the rights of the creditors of the corporation.  
*Psychaud v. Lane*, 404.
10. In conducting a case before the district court the judge is necessarily invested with a large discretion in the matter of granting a continuance, and if the appellant fails to advise the appellate court by bills of exceptions of the errors of the judge in refusing a continuance, then and in such case the Supreme Court will maintain the ruling of the judge *a quo* refusing it.  
*Powell v. Jenkins*, 444.
11. An exception to the capacity of the plaintiff to stand in judgment should not be permitted to be filed after the general issue has been pleaded, because the general issue admits the capacity of the plaintiff. 21 An. 188.  
*Houston v. Ohilders*, 472.
12. Property of a succession under administration can not be seized and sold under a judgment against the deceased owner. A sale of property or lands thus situated under a writ of *feri facias* issued from the district court is an absolute nullity, and the purchaser is responsible to the succession for rents from the date of the notice of seizure, but the claim for rent is prescribed by three years.  
*Ib.*
13. A proceeding by rule against an administratrix requiring her to show cause why she should not be dismissed from office for gross neglect of duty, and why judgment should not be rendered against



**PRACTICE—Continued.**

her and her sureties *in solido* for the amount claimed in the rule is irregular, and a judgment rendered thereon dismissing her from office will be annulled on appeal.

*King v. Succession of Trigg*, 517.

**PRESCRIPTION.**

1. By the act of Congress of June 11, 1864, the prescription of actions was suspended between citizens of the adhering States and those of the so-called Confederate States. A claim held by a resident of the State of New York, an adhering State, against a citizen of Louisiana, a seceding State, was not therefore affected by the prescription enacted by the latter State during the time of such suspension. But in computing the time in which such obligations or claims are prescribed, the time during which the war continued must be deducted from the estimate, and the remainder must alone be counted.

*Auchincloss v. Frois*, 31.

2. The plea of prescription of one, two and three years is untenable against an action for rent. An action for the recovery of rent is only prescribed by three years. C. C. 3538.

*City of New Orleans v. O'Connor*, 73.

3. The action for a separation of patrimony is prescribed by the lapse of three months.

*Levi v. Corkern*, 127.

4. The act of Congress of June, 1864, which suspended the prescription of actions in cases where the creditor resided within the limits of the adhering States and the debtor resided within the limits of the insurrectionary States, during the late war, does not apply to cases where the creditor and debtor both resided within the limits of the insurrectionary States.

*Miltnerberger v. Witherow*, 183.

5. Prescription once acquired in favor of an estate can not be waived by an acknowledgment of the claim by the administrator. *Ib.*

6. A judgment in favor of a tutor of minors is prescribed by the lapse of ten years from its rendition, if it has not been revived in the manner pointed out by law. Session Acts of 1853, page 250, 23 An. 587.

*Wade v. Caspari*, 211.

7. A title to real estate is acquired by thirty years' peaceable and uninterrupted possession as owner. In a suit for the recovery of real estate on the ground that the title of the possessor is simulated, the plaintiff can not be permitted to treat the title of defendant as a pure simulation, and at the same time urge the sale as real, for the purpose of defeating the plea of prescription.

*McLean v. Keegan*, 240.

8. An action by judgment creditors to annul a mortgage given by the judgment debtor on the ground that it is fraudulent and was given by the judgment debtor in fraud of their rights, is prescribed by one year. Revised Civil Code 1978.

*Brewer v. Kelly*, 246.

### **PRESCRIPTION—Continued.**

9. A purchaser of real property can not maintain an action to annul the sale on the ground that his vendor's title is affected with a relative nullity. *Cannon v. Female Orphan Society*, 452.
- 10 The uninterrupted possession of real estate for thirty years vests an absolute title in the possessor without the possession being in good faith. *Ib.*
11. When a person not a party to a promissory note puts his name upon the back of it he binds himself as surety, and as surety he is bound *in solido* to the holder. Citation served upon one of several obligors *in solido* interrupts the current of prescription as to all the obligors. The plea of prescription can not, therefore, be maintained by one obligor *in solido* if service of citation has been made upon another obligor *in solido* before prescription has been acquired. *Rogers v. Gibbs*, 467.
12. The action by a creditor to annul a judgment of the wife against her husband, on the ground that it was obtained through fraud and collusion, is prescribed by one year. C. C. 1994. The same prescription applies to the attack in the sale to the wife made under the judgment for fraud or collusion. *Powell v. O'Neil*, 522.
13. The act of Congress of June 11, 1864, suspending the prescription of actions in the insurrectionary States has no retrospective effect, and only suspends the prescription of such actions from the date of its passage during the time the defendant was beyond the reach of legal process. In this case it is shown that legal process could have been had against the defendant from and after the month of August, 1865. Held—That the plaintiff could, under this law of Congress, only claim a suspension of prescription from the eleventh day of June, 1864, until the month of August, 1865, which time, when deducted from the time which intervened from the maturity of the obligation to the bringing of the suit, was sufficient to defeat the plea of prescription. *Harrison v. Succession of Adger*, 564.
14. The plea of prescription can not be filed or heard in the Supreme Court in a case where an appeal has been taken from an order of seizure and sale. The remedy in such a case is by injunction.

*Dufossat v. Laizer*, 618.

### **PRIVILEGE.**

1. An overseer on a plantation has a preference over the furnisher of supplies on the proceeds of the crop for the payment of his wages. *Bouligny v. Lacour*, 76.
2. A confession of judgment by a defendant who is domiciled in a different parish from that in which the judgment is rendered, is an absolute nullity as against privileged creditors, 23 An. 255, and

**PRIVILEGE—Continued.**

the privileged creditors have such an interest as will authorize them to urge the absolute nullity of such a judgment whenever and wherever it is sought to be enforced against property upon which they have privilege. *Bush v. Chapman*, 277.

3. A judgment creditor who acquires a preference on the property of his debtor by seizure is not entitled to proceed to the sale after the debtor has obtained a respite by the consent of a majority of his creditors. *Huppenbauer v. Durlin*, 359.

4. Only creditors who have a privilege on the property of the debtor before, and at the time the respite is granted, can proceed to sell under article 3095 of the Revised Civil Code after the respite is granted. A creditor, therefore, who has a privilege or preference on the property of his debtor, resulting from a seizure alone, is not permitted to proceed to the sale in violation of the respite. *Ib.*

5. The builder's lien and privilege allowed by law on the building erected by the contractor only dates and takes rank from the day it is recorded in the office of the Recorder of Mortgages. The recording of a detailed statement of the amount due, attested under the oath of the builder, only gives him a privilege on the building from and after it is recorded. It does not date back to the time of the contract for the erection of the building. Other mortgages or privileges of prior date of record will therefore take precedence over such a privilege in the distribution among the creditors of the proceeds of the sale of the property.

*Marmillon v. Archinard*, 610.

**PROHIBITION.**

1. After an appeal has been granted, the court *a quo* is without jurisdiction to pass upon the question whether the appeal is a nullity or not, and any order made by the lower court in the case until the Supreme Court has passed upon the appeal is void, and a writ of prohibition will issue in such a case from the Supreme Court restraining the judge *a quo* from proceeding in the case until the appeal is passed upon.

*State ex rel. Dubuclet, Treasurer, v. The Judge of the Eighth District Court*, 600.

**PUBLIC LANDS.**

1. A patent that has been issued by the Governor of Louisiana through error, for public lands within the State, can not be made the basis of an action of slander of title against the owner, who holds the same land under an entry previously made at the land office of the United States. *Havard v. Atkins*, 511.

**RES JUDICATA.**

1. Isolated expressions used by a court in giving reasons for its judgment can not control the force and effect of a formal decree. A

## RES JUDICATA—Continued.

decree which pronounces a document claimed to be a codicil to a last will and testament a forgery, can not therefore be controlled, limited or qualified by expressions used by the court in giving its reasons for the judgment. The plea of *res judicata* will be maintained where the suit is between the same parties and is founded on the same cause of action. *Succession of McDonogh*, 33.

2. Plaintiff, a forced heir, brought suit to reduce a donation to her stepmother, made in the last will of her deceased father, which gave to her stepmother the personal property of his estate in fee simple, and the usufruct of his real estate during her widowhood. The stepmother obtained a final judgment dismissing the opposition to her account as executrix, and approving the donation. Held—That the stepmother might plead this judgment as *res judicata* against the claim of the heirs, although it had been rendered on opposition to her account as executrix.

*Bodechtel v. Frelinghuysen*, 104.

3. A judgment declaring a sale of property under execution a nullity, is not *res judicata* as to the purchaser who was not a party to the suit. The purchaser is therefore legally entitled to the rents of such property until his title is declared null and void by judicial proceedings to which he is a party. *Peters v. Spitzfaden*, 111.

4. A judgment which recognizes one person as an heir to an estate, and reserves the rights of all other persons to show their heirship in a legal way, can not be pleaded as *res judicata* against other persons who afterward claim to be heirs. The fact that such a judgment has been appealed from, and the appeal has afterward been abandoned, does not conclude other persons from asserting their heirship judicially.

*Succession of Taylor*, 326.

5. A judgment between the same parties on the same cause of action is only *res judicata* as to the questions actually passed upon in the first judgment. So that questions urged in the first judgment and not passed upon by the court, may become the basis of another suit without being defeated by the plea of *res judicata*.

*De St. Romes v. Carondelet Canal and Navigation Company*, 331.

6. A continuous resistance to the enforcement of a judgment interrupts prescription from running against the action of nullity. C. P. 612. *Ib.*

7. In this action to recover on a judgment rendered in the city of New York, the defendant set up a reconventional demand, to which the plaintiff urged the plea of *res judicata*, the same defense having been pleaded before the New York court. The evidence offered, and the law of New York in reference to the judgment showed that the reconventional demand set up here was not before the court of New York, and was not passed upon in the rendition

**RES JUDICATA—Continued.**

of the judgment. Held that if the reconventional demand set up here was not passed upon by the court in New York, it was not *res judicata* there, and could not be so here.

*Glass v. Wheeliss*, 397.

8. In this case property was seized and sold by the sheriff under execution. The purchaser obtained a judgment on motion approving the sale. The defendant brings this action to annul the sale on the ground of want of authority in the sheriff to sell, and that there was no sufficient description of the land adjudicated. The purchaser pleaded the judgment in motion as *res judicata* and a bar to the action. Held—That the judgment on the motion appearing to be regular in form, all the requirements in such a case having been complied with, it operated as a bar to further proceedings touching its validity; that the defenses urged here of want of description, etc., should have been urged at the trial of the suit for the motion.

*Willis v. Nicholson*, 545.

**RESOLUTORY CONDITION.**

1. The right given by law to the vendor to have the sale dissolved on the failure of the purchaser to comply with the terms thereof, by paying the price stipulated, is not transferable, and does not pass with the transfer of the notes or obligation of the purchaser held by the vendor. In such a case only the right of the vendor to enforce the payment of the notes with the securities, passes to the indorsee, but not the right to rescind or disturb the sale itself.

*Swan v. Gayle*, 498.

2. This suit is brought by the vendor for the resolution of the sale of a tract of land, on the ground of the non-payment of the price. The vendee answered that the notes given for the price were prescribed, and their payment could not be enforced, and the right to the resolution of the sale no longer existed. Held—That the right to have the sale dissolved and to recover back the property for non-payment of the price, was a distinct and independent right from that of enforcing payment of the notes, which was only prescribed by ten years. That it being a distinct and independent right, and not an accessory of the notes, it could be maintained, notwithstanding the notes held by the vendor for the price were prescribed and could no longer be enforced.

*Templeman v. Pegues*, 537.

**SALE.**

1. In the year 1861 a contract was entered into between the City of Jefferson and Joseph Kaiser, granting to the latter the right to build street railroads through the corporate limits of the city. Article ninth of the contracts stipulated that in case of failure by the contractors of either of said roads to commence or complete

## SALE—Continued.

either of said works, or any part thereof, within the period herein prescribed, or in case the Common Council be dissatisfied with the manner in which the works are being executed, the Council shall have the right to annul the contract without putting the contractor in default. It was further stipulated that in case the contractor fails to complete the works within the time prescribed, he shall forfeit all claims for work done, and the city shall have the right to *resell* the privilege and right of way at the risk of the contractor and his sureties *in solido*. Held—That under the authority given in this section to *resell*, nothing but the right of way and privilege could be resold; and that if the road was once fairly completed this provision, having fulfilled its coercive purpose, ceased to have any further force.

*Young v. Magazine Street Railroad Company*, 53.

2. Movables, such as bricks in the kiln on a plantation, do not pass to the vendee by a sale of the land, unless it is so expressed in the deed of sale. A purchaser of a plantation who converts the bricks in the kiln to his own use, with the knowledge at the time of the purchase that they had been previously sold to another person by his vendor, is therefore liable to the owner for their value.

*East v. Ealer*, 129.

3. A sale of a certain number of bales of cotton to be delivered thirty days after demand, is at the risk of the seller until delivery. The defense that the cotton of the defendant was destroyed during the war will not avail, if by the terms of the contract no particular lot of cotton was indicated as being sold; but the seller in such case is required to fulfill his contract of sale by delivering the number of bales sold or by paying the price in money.

*Warren v. Kirk*, 150.

4. A contract of sale of a lot of cotton is complete if the price has been agreed upon and possession has been given. In such a case the sale is considered as executed, and the administrator of the estate who has made the contract will not be listened to when he comes into court and asks that it be set aside on the ground of an illegal consideration, such as Confederate money.

*Sloan v. Stevenson*, 273.

5. A party, or parties, who have contracted to sell and have sold any public security, such as a bond, may be compelled by suit to deliver the bond sold, or to pay the value thereof at the time of the sale, the vendor being first put in default.

*Gallagher v. Pike*, 344.

6. Liquor or spirits that has been conditionally sold and its quality or character has been changed by the vendee from rum to that of neutral spirits, is liable in its changed condition to be seized by

**SALE—Continued.**

the creditors of the vendee, although it has not been paid for or actually delivered—the changing the liquor from one thing to another by the vendee being considered such a delivery as would protect the creditors who were without notice of the claim of the vendor.

*Terrill v. Hays*, 428.

7. A possessor of real estate under a title derived from a judicial sale, made under a judgment, can not be evicted therefrom in a suit by another claimant by a different title, unless the claimant alleges and shows that the judgment itself is illegal, or that the sale is illegal and void.

*Lacroix v. White*, 445.

8. A dealer in furniture or other articles of commerce has the right to trade with and make sales of furniture to a person engaged in keeping a house of prostitution, and the courts will enforce such right by compelling the person who purchases the furniture to pay for it, although it be shown that the vendor knew at the time of the sale the use to which the furniture was to be applied.

*Hubbard v. Moore*, 591.

**SEQUESTRATION.**

1. In a sequestration suit where the preservation of the property sequestered is provided for by the defendant giving a bond, the appointment of a judicial sequestrator is illegal, and the order appointing a sequestrator in such a case, with the order homologating his account, will be annulled and set aside on appeal.

*Young v. The Magazine Street Railroad Company*, 40.

2. A bond given in a sequestration suit for the amount fixed by the judge, signed by the plaintiff in the sequestration suit and two other persons, and filed by the clerk with the number of the suit in the district court, is a sufficient compliance with the law to render it incumbent on the defendant in sequestration to urge any objections he may have to its informalities in *limine litis*.

*Vestal v. Sallis*, 153.

3. A defendant in a sequestration suit who appears by petition, and asks to bond the property sequestered and take it from the possession of the court, is concluded from urging the plea of want of citation. 21 An. 138; 22 An. 368.

*Bush v. Dering*, 272.

4. Personal property that has been seized under a sequestration and released from seizure on a bond given by the defendant, reverts back to his possession, and he may dispose of it at his pleasure without consulting the seizing creditor. In such a case the securities on the bond can not escape liability on the ground that the defendant has been required to remove the property sequestered from the premises leased.

*Warfield v. Stubbs*, 569.

**SEPARATION OF PROPERTY.**

1. To enable a judgment creditor to maintain a seizure of property

## SEPARATION OF PROPERTY—Continued.

held by the wife as her separate estate, under a judgment of separation on the allegation that the judgment of separation was collusive, and rendered in fraud of the rights of the seizing creditor, the seizing creditor must show affirmatively that he was a creditor at the time the judgment of separation was rendered. C. C. 3434; 6 An. 391; 4 R. 336.

*Hanney v. Maxwell*, 49.

2. If it be shown that the wife brought no dowery into the marriage, and that she had no actual claims against her husband, still she has the right to obtain a separation of property from her husband if she shows that he is in embarrassed circumstances, and that his condition is such that she might lose any property she might receive thereafter in her own right from legacies or otherwise if it were to fall into the community. *Webb v. Bell*, 75.

3. Where a judgment of separation of property has been executed or partially executed by the husband giving to the wife in payment thereof certain real estate within a reasonable time after its rendition, a creditor of the husband can not maintain a seizure of the property thus given in payment or part payment of the wife's judgment of separation, on the ground that such judgment is void for want of prompt execution thereof. In such a case the wife having established the validity of her judgment, and her title to the property, which she acquired from her husband in payment thereof, is entitled to an injunction to stay the sale of her property in payment of her husband's debts. *LeBlanc v. Dayries*, 138.

4. In a suit by the wife against her husband for a separation of property, the allegation that "owing to the insolvency of her husband it becomes necessary for the preservation of her acquisitions, the maintenance of herself and family, that a dissolution of the community be decreed," is deemed sufficient to admit proof that she has the ability to make acquisitions. *Meyer v. Smith*, 153.

5. In a suit by the wife for a separation of property from her husband, she is a competent witness in her own behalf. *Ib.*

SEE HUSBAND AND WIFE.

## SEIZURE AND SALE.

SEE EXECUTORY PROCESS.

## SHERIFFS AND DEPUTIES.

1. A sheriff who has been ordered to sell property and retain the proceeds subject to the further order of the court, must account for the proceeds whenever called upon. And the sureties on his official bond, who have subscribed as such before he is called upon to pay, are liable in case of failure of the sheriff to pay over the funds when demanded, although their liabilities as sureties were



**SHERIFFS AND DEPUTIES—Continued.**

contracted since the sheriff came in possession of the funds which he was ordered to hold subject to the further order of the court.

*Wents v. Ledoux*, 131.

2. A sheriff who himself, or through any of his deputies, under the pretense of enforcing a civil process, illegally arrests and imprisons a citizen, and while holding him under duress, illegally seizes and takes away and disposes of his property, is liable to a civil action in damages, the measure of which will be governed by the aggravation and unprovoked character of the conduct of the sheriff or deputy.

*Frazier v. Parsons, Sheriff*, 339.

3. The sheriff who serves any process or citation on a defendant is required to make a return on the original paper of the manner of such service. If he has made an error in making his return, and detects it before he files the paper in court, it is his duty to correct the mistake and make a return in conformity with the facts

*Rousseau v. Gayarre*, 355.

4. A service of citation at the domicile of the defendant is good if it be served upon a free person above the age of fourteen years, who resides at the domicile; and if the defendant resides on a plantation, then by the word domicile is meant any house or place of residence situated on the plantation which is occupied as a residence, so that the service is good if made on a person of proper age who resides in another house than that of the defendant; nor need such person be actually inside of the house of the defendant at the time of the service; it is sufficient if he or she resides at the domicile.

*Ib.*

**STOCK COMPANIES.**

1. Where shares of stock in a company have been regularly subscribed for, and the subscriber dies, and his universal legatee claims and is decreed by a final judgment of a court of competent jurisdiction to be the owner thereof, such shares of stock can not be taken by another subscriber, especially if, at the time of the second subscription, the books of the company have been closed by a resolution of the board of directors.

*State ex rel. Hawksworth v. Crescent City Gas Light Company*, 318.

**STATE COURTS.**

1. The courts of Louisiana have the undoubted power and right to aid in carrying into effect the provisions of a will made by a citizen or subject of France, when a portion of the estate of the testator is situated within the State, and to aid in the transmission of the funds of successions within her jurisdiction to the representatives of the succession abroad. This power is based on the broad principle of the comity of nations, but it can not be exercised to the prejudice of domestic creditors.

*Succession of Cordeviollé*, 319.

## STATE COURTS—Continued.

2. In this case it appears that the testator resided in Paris, France, where he died, leaving an estate in France under the control of executors appointed by the will. For the administration of the property in Louisiana a dative testamentary executrix was appointed. Under the dispositions of the will the property was required to be reduced to cash as soon as practicable, the same to be invested in particular securities in Paris for distribution. The dative testamentary executrix of the Louisiana estate became the purchaser at the probate sale of some of the property, and refused to pay over the price or account for it in the account of her administration, on the ground that she being an heir had a right to hold on to the purchase money until her rights, as an heir, were definitely ascertained, and then only to account for the difference. Held—That she was bound by the terms of the will, and as the will had directed that all the estate should be converted into cash as soon as possible, and be invested in particular securities, in Paris, for distribution; that the executrix in Louisiana, being an heir, could not on that account retain the purchase money in her hands until the distribution, which was directed by the will to be so invested for distribution, and that she must account for it the same as other purchasers. *Ib.*
3. A dative testamentary executrix, residing in Louisiana, and having under administration an ancillary succession in this State, which belongs to a foreigner residing in Paris, France, where the principal estate is situated, can not be proceeded against by rule to sell the balance of the estate in her hands, nor will an injunction issue under a rule taken to prevent her from disposing of the funds or notes on hand. *Ib.*
4. The courts of Louisiana will not entertain a suit founded upon a claim alleged to have been acquired in consideration of army stores furnished to the enemies of the United States during the late civil war. *Clements v. Graham, 448.*

## SUCCESSION.

1. The fact that a sale of succession property has not been recorded does not affect the title as between the vendor, the succession, and the vendee, the purchaser. In such a case if the vendee places a mortgage on the property after he has purchased it, the holder of such mortgage may cause the property to be seized and sold in satisfaction thereof, and the title of the purchaser to the property mortgaged will not be defective because the act of sale from the succession to the mortgageor was not recorded before the mortgage was given. *Gaiennie v. Gervais, 79.*
2. After a succession has been partitioned among the heirs, and the portions allotted to each one of the heirs has been set apart to

SUCCESSION—Continued.

- them, the share of one of the heirs can not be pledged, because it can not be delivered. *Forbes v. Burke*, 85.
3. A written instrument in favor of a creditor signed by one of the heirs, acknowledging her indebtedness and transferring her interest to the creditor, has no legal effect, because there was no fixed price, nor an extinguishment of the debt, it being neither a sale nor a payment of the debt. *Ib.*
  4. The widow, left in necessitous circumstances, has the right to recover from the succession of her husband one thousand dollars in preference to the mortgage creditors. In case she has already received a portion of this amount from the sale of personal property, it will be deducted from the one thousand dollars, and she will recover the balance. *Mangum v. Bacon*, 130.
  5. A succession sale of community property made to pay the debts of the estate can not be annulled because minor heirs have an interest in the succession, of which they have not been divested, according to law. *Willard v. Peyton*, 342.

SUBROGATION.

1. A conventional subrogation of a privilege given to secure the payment of a draft must be made at the time it is paid. *R. C. C.* 2160. *Surghnor v. Beauchamp*, 471.
2. If a legal subrogation has taken place in favor of the person who has paid the draft, and the drawer has deposited a lot of cotton with the drawee sufficient to pay a superior privilege claim for rent, then and in such case the proceeds of the cotton will be first imputed to the payment of the rent note, and the legal subrogee has not such a privilege on the crop as will entitle him to provisionally seize it. *Ib.*

TAXES AND TAX COLLECTORS.

1. The Legislature has the power under the Constitution to commute the taxes imposed on a corporation created by it, and thereby to relieve it from the payment of all other licenses or taxes by the State itself or by any municipality created and authorized by the Legislature to levy a license or tax on such corporation. The exemption of the Lottery Company, in its charter, from the payment of all other taxes and licenses, on its payment annually into the State treasury a certain amount for the benefit of the school fund, is not therefore in conflict with article 118 of the Constitution, which requires that taxation shall be equal and uniform throughout the State. *Louisiana State Lottery Company v. City of New Orleans*, 86.
2. The doctrine announced in the case of the State Lottery Company *v. A. Richoux et al.*, 23 An. page 743, deciding that the title to the act creating the Lottery Company was not in conflict with article

## TAXES AND TAX COLLECTORS—Continued.

114 of the Constitution, which requires that the objects of every act must be expressed in its title, is reaffirmed by this decision, and it is again held that the title of said act sufficiently expresses its objects. *Ib.*

3. Section nine of the Revenue Act of 1871, which gives the Governor the power to appoint tax collectors in the different parishes of the State who are to hold their offices for the term of two years, does not vacate the offices of tax collectors, who were appointed under the Revenue Law of 1870 for the term of two years. An appointment of a person as tax collector under the law of 1871, who had previously been appointed to the same office under the law of 1870 and rejected by the Senate, was therefore in conflict with article sixty-one of the Constitution which forbids the appointment of any person to the same office during the recess of the Senate, who had been rejected by that body. *Edwards v. Evans, 177.*

4. Article 118 of the Constitution, which makes it obligatory on the General Assembly to levy a poll tax for school purposes, does not prohibit the assessment of a tax on property for the same purpose. An additional tax on property for the support of public education is not therefore unconstitutional.

*Flower v. Legras, Tax Collector, 204.*

5. The Revenue Act which authorizes the Auditor to communicate to the tax collectors the amount necessary to be collected for interest purposes, does not impose upon the Auditor the duty, or confer upon him the power of levying a tax. It merely designates him as the officer to ascertain the amount of interest tax to be collected, and is not therefore in violation of the Constitution which lodges the taxing power exclusively in the legislature. A taxpayer has no right to complain if the amount of taxes demanded of him is shown to be less than the amount he owes. *Ib.*
6. A commercial firm that has been dissolved and its dissolution has been duly published, can not afterward be legally assessed to pay licenses or taxes. Nor can the city or State who has made such assessment recover the taxes assessed on the ground that it was made the duty of such firm to examine and cause to be corrected the assessment roll within a given time. In such a case the doctrine of acquiescence does not apply. If judgment has been rendered against a firm for taxes assessed after the firm has been dissolved, then and in such case, the firm has the right to sue for the nullity of such judgment.

*Von Phul v. The City of New Orleans, 261.*

7. A suit by the owner to redeem lands that have been sold for taxes is not a petitory action to recover the lands on the ground of a superior title. *Coleman v. Baker, 524.*
8. A purchaser of lands at a tax sale must be reimbursed the purchase money with interest before the owner can recover. *Ib.*

## TOWBOAT.

1. A towboat used in towing barges or other water craft, which are loaded with freight, from one point to another on the river, is a common carrier, and the persons owning such towboat, who undertake to tow a barge, loaded with freight or merchandise from one given point to another on the Mississippi river, first giving a bill of lading for the transportation of the cargo on board of the barge, are liable for the delivery of the cargo at the port of destination the same as if it had been placed on board the towboat herself. *Bussey v. Mississippi Valley Transportation Co*, 165.
2. The value of goods shipped on board of a barge at St. Louis, to be towed to New Orleans by a towboat, may therefore be recovered from the company owning the towboat in case of loss while on the trip, resulting from the negligence, carelessness or want of skill in the persons managing the towboat. *Ib.*

## TRADE MARKS.

1. The leading principle of the law of trade marks is, that the manufacturer or merchant who has produced or brought into market an article of use or consumption that has found favor with the public, and who, by affixing to it some name, device or symbol which serves to distinguish it as *his*, and to distinguish it from all others has furnished his individual guaranty of its value, shall receive the reward of his skill, and shall not be deprived thereof by infringement or imitation. *Wolfe v. Barnett*, 97.
2. The words which compose a trade mark need not *each* be new. If the combination thereof be new and be descriptive of the origin of the goods and their ownership by the manufacturer who devises the mark, it will be unlawful for any other person to lift the combination or any important part thereof. *Ib.*
5. It is unlawful to put up imitation goods under the name of the real manufacturer, and the excuse that such an act was authorized by a person of the same name as that manufacturer, is absurd. *Ib.*
6. The fact that a trade mark label is copy righted, but the date of entry is not given as required by the act of Congress, is of no importance in a suit in a State court for damages for imitation of a trade mark. *Ib.*

## SCHOOL BOARD.

1. A board of school directors of a parish can not be compelled by judicial proceedings to make a different disposition of the funds entrusted to their care than that provided by law. Where, therefore, the law has made provision for the settlement of outstanding claims against the school fund, which bear date prior to the appointment of the school board, a suit can not be entertained

## SCHOOL BOARD—Continued.

against the president or board of directors to compel its payment out of the school funds in their hands, the disposition of which has been regulated by law. *Offut v. Acheverra*, 93.

## TUTORS AND TUTORSHIP.

1. In this case all the questions in dispute between the tutor and the minor were referred to an auditor for adjustment, who made his report, which was homologated by the judge *a quo* and judgment rendered thereon in conformity with the terms and conditions of the report. One of the conditions of the report was that in case the minor refused to receive a building which had been erected on the minor's property by the tutor without authority of law, that then the tutor should have the right of removing said building from the premises. The minor subsequently refused to pay for the building. Held—That the judgment being in the alternative, giving the minor the right to accept or reject the building, and in the latter case the tutor had reserved to him the right of removing it, that as the minor had refused to accept the building, the tutor could not claim to be credited with the value of the building on the amount found to be due by him as tutor to the minor, but that he was left to exercise his right secured to him by the judgment of removing the building. *Succession of Anglada*, 51.
2. The under tutor can not maintain an injunction to stay the foreclosure of a mortgage granted by the surviving widow (the mother of the minors) on her half of the community property, because he is not the representative of the creditors, nor is he the representative of the residuary interest of the widow in community. *French v. Thompson*, 285.
3. A tutor has the right to purchase at the sale of the minors' property which he is administering, if he be the surviving partner in community, or an heir or a legatee of the deceased. *Bland v. Lloyd*, 603.
4. In a suit by the heirs to recover the property of their ancestor, which has been sold by the tutor, on the allegation that the sale made by the tutor through the agency of a third person is a nullity, parol evidence is admissible to show that the estate was in debt, and that the purchase money went to discharge the debts of the estate, and that the balance was divided among the heirs of age. *Id.*
5. Where property of an estate which is largely in debt, represented by a tutor, has been, under the advice of a family meeting, sold at judicial sale, and the proceeds of the sale have been applied to the payment of the debts, and the balance has been divided among the heirs in pursuance to the advice and directions of a family meeting, the sale is valid and binding upon the heirs. In such a

## TUTORS AND TUTORSHIP—Continued.

case the heirs of age having taken the residue of the price of the sale and divided it among themselves, before they can institute and prosecute a suit for the recovery of the property on the ground that the sale was a nullity, must return or offer to return the price they have taken or which inured to their benefit—they not being permitted to hold on to the price and at the same time prosecute a suit for the recovery of the property itself. *Id.*

## WALL IN COMMON.

1. A person who has erected a wall on the line of his lots or premises, which is afterward used by the adjoining proprietor as a wall in common, can recover from such person one-half the cost of the construction of such wall. In such a case the later proprietor is bound for one-half the cost, although he has purchased the property from another, who, previous to the sale, used the wall as one in common.

*Winter v. Reynolds*, 113.

## WAREHOUSE KEEPER.

1. The keeping of a warehouse floating on the water is an employment requiring skill, and any person engaged in this kind of business who fails to exercise that skill is guilty of gross carelessness. 24 An. 165.
2. A person keeping such a warehouse who receives a lot of gunpowder on storage is liable to the owner for its value in case of loss by the sinking of the wharfboat, because the sinking occurred through the failure of the warehouseman to exercise the required skill to prevent it, or by failing to remove the powder on storage before the floating warehouse sunk.

*Hamilton v. Elstner*, 455.

## WILLS.

1. A designation and fixing by the testator in his will the per cent. which his executors are to receive as compensation for administering his estate, does not constitute them universal legatees, or legatees by universal title. And they, the executors, are not therefore bound to contribute to the payment of the debts.

*Succession of Kock*, 243.

2. Where the rate or per cent. of commissions allowed the executors has been fixed by the testator for administering his estate, they are entitled to such rate of commissions on all the property inventoried as composing the estate, and the heirs who have postponed by legal proceeding the sale of certain property which the executors are directed by the will to sell, can not make successful opposition to the payment of the commissions on the ground that the property has not been administered upon and sold according to the wishes of the testator.

3. A person can not claim to be placed upon the *tableaux* as a legatee of the testator under the will, if it has been decided that his claim is simulated and fictitious.

*Succession of Pointer*, 276.

## WILLS—Continued.

4. The omission of a notary public in writing a nuncupative will by public act, to use the expressions "as dictated," is not good ground for annulling the will. These expressions are not sacramental, and if the notary uses other language which conveys the same idea, the will is not void because these expressions are not used.  
*Heirs of Hoover v. York, 375.*
5. An illegal disposition in a will to a legatee by particular title does not destroy or impair the rights of the legatee by universal title.  
*Ib.*
6. A particular legacy that has lapsed, because of the incapacity of the legatee to take, inures to the advantage of the universal legatee.  
*Ib.*
7. A person addicted to intemperance and subject to consequent fits of mental derangement, may make a will if he be *compos mentis* at the time, and the burden falls upon those who assail such a will to show the existing insanity or incapacity of the testator at the time.  
*Hebert v. Winn, 385.*
8. A capricious bequest in a will does not constitute proof of insanity in the testator.  
*Ib.*
9. Where a will has been made by a citizen of this State, while in another State of the Union, and has been admitted to probate there, or elsewhere before a court of competent jurisdiction, the presumption is that the will was executed and probated in accordance with the law of such State or place, and the party who attacks it, whether directly or indirectly, must defeat such presumption by sufficient proof.  
*Ib.*
10. The fact that words appear in an olographic will which are not in the handwriting of the testator is not good cause for annulling the will, if the words themselves do not change the meaning nor alter the dispositions made by the testator in his own handwriting.  
*McMichael v. Bankston, 451.*
11. A marriage contracted in Spain between parties who had formerly lived together in a state of concubinage in Louisiana, but who removed to Spain to reside there permanently, had the effect of legitimizing the children born in Louisiana before the removal, and a will made by a man in this situation before the marriage, who after the marriage in Spain again moves to Louisiana with his wife and children thus legitimated to live, and he and his wife both die here, the legacies must be reduced to the disposable portion of the testator, because the marriage legitimizes the children, who become forced heirs, which revokes the will and limits its dispositions to the disposable portion, the same as if the children had been born in lawful wedlock posterior to its date.  
*Succession of Caballero v. Executor, 573.*



**WILLS—Continued.**

12. The fact that the woman in this case was a person of color, who at the time of the marriage in Spain was by the laws of Louisiana prohibited from contracting a marriage with a white man, would not affect the marriage in Spain between the same parties, nor would it affect the legal consequences of the marriage, such as the legitimizing the offspring before the marriage, notwithstanding the prohibition in the Louisiana law. The marriage being good and valid by the laws of Spain, it was also valid here. If, therefore, the law of Louisiana has been subsequently changed, and the prohibitions to the marriage between a white person with a person of color has been removed, then such children so legitimized by the marriage in Spain can inherit the estates of their parents in Louisiana the same as other legitimate or legitimized children.

*Ib.*

- 13 In the last will and testament of Mrs. A. M. Schneider, the following clause appears: "Thus done and passed in the house and room above described, on the above day and date, and signed by the said testatrix, the witnesses and the undersigned notary, the said testatrix having declared she could not write, made her usual mark." Held—That the declaration that she could not write, followed by making her usual mark, was equivalent to the declaration that she knows not how to sign as required by article 1572 of the Civil Code. *Brand v. Baumgarden*, 628.

**WITNESS.**

1. A witness in a criminal trial, who has first been examined in chief, consigned and cross-examined, may be again recalled and re-examined, by the party who first introduced him, upon points touching which he had not before testified. *State v. Scott*, 161.

*J. R. Scott*

1930-30











